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No. A-751

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DONALD W. HANNON, M.D.,
Petitioner,

vs.

EDWARD J. DERWINSKI,
Administrator of the Veterans Administration, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment, as analyzed by this Court in *Cleveland v. Loudermill,* 470 U.S. 532 (1985), requires the provision of notice and a fair hearing, pursuant to 38 U.S.C. § 4110, to a tenured physician, who was discharged by the Veteran's Administration for failing to possess the necessary qualifications, at the time of his appointment, or in the alternative, was discharged for falsifying his application for employment?

2. Whether "mutually explicit understandings" about the qualifications of a tenured federal employee, who met the requirements of the agency's statute and temporarily failed to meet the requirements of the agency's regulations, mandates the provision of due process prior to his termination for failure to comply with the very regulations with which the agency excused compliance at the time of appointment, pursuant to this Court's holding in *Perry v. Sinderman,* 408 U.S. 594 (1971)?

3. Whether a federal agency should be estopped from invoking the contractual defense of *void ab initio* for purposes of voiding both the employment and due process rights of a tenured employee, when there is no language in the statute or regulations voiding such an appointment and when the agency had the express authority to hire the employee under its enabling statute but knowingly hired the employee in violation of its then current regulations?

PARTIES

Petitioner, Donald W. Hannon, is a physician who was employed by the Veterans Administration from July 20, 1979 through June 23, 1986. At the time of his termination, he held the position of Chief of Surgical Services at the Veterans Administration Medical Center at Marion, Illinois.

Respondent, Thomas K. Turnage, was the Administrator of the Veterans Administration at the time of Petitioner's dismissal from the agency.

Respondent, Dr. John Gronvall, was the Chief Medical Director of the Veterans Administration at the time of Petitioner's dismissal from the agency.

Respondent, Edward J. Derwinski, is the current Administrator of the Veterans Administration.

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TO: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, Donald W. Hannon, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on January 4, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 892 F.2d 653 (7th Cir. 1990), and is reproduced in Appendix C.

The orders of the District Court dated October 23, 1987 and May 13, 1988 are reproduced in Appendices D and E.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, which petitioner requests this Court to review, was entered on January 4, 1990. On February 13, 1990, the Court of Appeals denied petitioner's timely petition for rehearing and suggestion for rehearing en banc. On April 27, 1990, this Court granted petitioner's request for an extension of time, requiring the filing of this petition on June 13, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in active service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provisions are 38 U.S.C. §§ 4105, 4106 and 4110, which are reproduced in Appendix F. The relevant regulations are reproduced in Appendix G.

STATEMENT OF THE CASE

On or about July 20, 1979, Petitioner, Donald W. Hannon, M.D., obtained an appointment as a staff physician at the Veterans Hospital in Grand Junction, Colorado. In accordance with its statutory authority and regulations, the Veterans Administration investigated the status of Dr. Hannon's various state licenses.[1] By August of 1979, the Veterans Administration was fully apprised of the fact that Petitioner's active license in the State of Minnesota was restricted in the following fashion. The Doctor was required to practice in a governmental facility and his employer, the Veterans Administration, would have to report regularly to the State of Minnesota. The restriction flowed from some emotional problems the Petitioner had incurred as a result of his divorce. In compliance with these restrictions, the Veterans Administration made the necessary reports to the relevant state agencies. As a result of his performance at the Veterans Administration, Dr. Hannon eventually was awarded an unrestricted license during his tenure with the agency, and held an unrestricted license when his job was terminated.

In January of 1980, Petitioner was transferred to a Veterans Administration facility in Saginaw, Michigan, where he eventually obtained the status of a tenured, non-probationary employee. Until the restrictions of his license were lifted, State

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[1] When Dr. Hannon first applied for a staff position at the Veterans Administration Hospital in Grand Junction, Colorado, he erroneously believed that he had an unrestricted license to practice medicine in the State of Minnesota and a restricted license in the State of Washington. He subsequently learned that his license in Minnesota was in fact restricted. The Veterans Administration was aware of these facts and reported regularly to the State of Minnesota about his performance as a condition of his restricted license.

officals continued to contact the Veterans Administration and continued to require the federal agency to provide reports about his performance.

Dr. Hannon was reassigned a second time in April of 1983 to the Veterans Administration facility in Marion, Illinois after successfully completing his tenure at Saginaw. By October of 1984, as a result of the proficiency of his performance, he was appointed Chief of Surgical Service at Marion, Illinois. He also was permitted to enter into a Special Pay Agreement with the Veterans Administration in January of 1985, which provided that the Doctor would serve as a member of the Department of Medicine of Surgery of the Veterans Administration for the specified term of January 11, 1985 through January 10, 1989.

Throughout his tenure at the facility in Marion, Illinois, Dr. Hannon was considered a respected member of the staff whose performance was highly rated. This fact was reflected in an evaluation prepared by Robert T. Patton, the Medical Center Director, in July of 1985. In a Veterans Administration Proficiency Report, Dr. Patton formally noted that Dr. Hannon was a skilled surgeon, hardworking and a loyal employee. Dr. Patton went on to state that Dr. Hannon was a valued member of the staff and should be retained by the agency in his current position.

Despite the proficiency of his service, on June 23, 1986, Petitioner was informed orally by Dr. Patton that his employment with the Veterans Administration was terminated. Dr. Patton told Petitioner that officials at the Veterans Administration had directed him to take this action because of the restrictions placed upon Dr. Hannon's license by the State licensing board at the time he was first retained. Thus, there is no dispute that the decision to terminate Dr. Hannon was not related to his current performance, nor did it take into account the fact that he currently held an unrestricted license with the State of Minnesota.

A matter of days after his conversation with Dr. Patton, Petitioner received a "notification of personnel action" from the Veterans Administration. In this one paragraph document, dated June 27, 1986, Dr. Hannon was informed that his employment was "cancelled" as a result of his failure to possess a full and unrestricted license at the time of his original appointment. Under the relevant regulations, both the Administration and Chief Medical Director were required to approve the termination of Dr. Hannon's employment with the Veterans Administration because he held a centralized position.

Neither prior nor subsequent to the receipt of the letter terminating his employment, was Dr. Hannon provided with any of the procedural safeguards embodied in the statute or Veterans Administratoin regulations, which are assured to either a probationary or tenured physician. When Petitioner contacted the Office of Personnel Management, in an effort to obtain a refund of the retirement deductions withheld from his salary, Dr. Hannon was informed by a representative of that agency that he was not entitled to a refund because he had "falsified" his original application for employment.

With the exception of the notification of personnel action cancelling his employment and the letter denying his refund of the retirement deductions, Dr. Hannon failed to receive any further informal or formal official explanation for his termination from the agency. Nonetheless, shortly after his discharge, newspaper articles appeared in both the *New York Times* and *USA Today* describing the circumstances of the discharge of doctors from the Veterans Administration. These articles stated that the agency was engaged in an audit of its doctors and a review of the status of their licenses in response to complaints of poor care by incompetent physicians. More specifically, an article published in the *New York Times* on October 10, 1986 stated that as a result of this audit, the Agency dismissed four doctors, in part, because the study revealed that these doctors held deficient licenses because of drug abuse.

Dr. Hannon instituted this action in the United States District Court for the Southern District of Illinois on March 3, 1987. In Count I of his complaint, Petitioner alleged that the termination of his employment with the Veterans Administration, without an opportunity to respond to any charges or confront any evidence, constituted a deprivation of his property interest, without due process of law, in violation of the Fifth Amendment of the Constitution. In addition, he alleged that the intentional publication of false information, in connection with his discharge from his position as Chief of the Surgical Division at Marion, Illinois, resulted in an injury to his name and reputation, as well as having a negative impact on current and future employment opportunities. As a result, Petitioner alleged in his complaint, an infringement of his constitutionally protected liberty interest, without due process of law.[2]

On June 19, 1987, all of the defendants filed a motion to dismiss the complaint. By an Order dated October 23, 1987, the United States District Court for the Southern District of Illinois granted the motion to dismiss with respect to the Veterans Administration and the United States. The district court, however, refused to dismiss the claims against either of the two individual defendants: Thomas Turnage, the then current Administrator of the Veterans Administration, or Dr. John Gronvall, the Chief Medical Director. (See Appendix E hereto.)

In response to the district court order denying their motion to dismiss, on December 29, 1987, the individual defendants filed a motion for summary judgment in which they alleged that they

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[2] The complaint also contains two statutory causes of action premised upon 38 U.S.C. § 4110 and 38 U.S.C. § 4106. In the second count, Petitioner alleges that the actions of the defendants were violative of plaintiff's right to notice and a fair hearing embodied in 38 U.S.C. § 4110. In the final count, Dr. Hannon contends that the defendants violated 38 U.S.C. § 4101 which provides that physicians may be separated from the Veterans Administration only if there is a finding that he was not fully qualified or his performance was not satisfactory.

were shielded from liability pursuant to the doctrine of qualified immunity because their conduct did not violate any clearly established constitutional or statutory right. More specifically, these defendants asserted that the separation of Dr. Hannon was neither illegal nor violative of any clearly established constitutonal rights. The motion was denied by the district court on May 13, 1988. The court concluded that at the time of Petitioner's termination, clearly established law required Dr. Hannon be afforded prior notice and an opportunity to be heard. (See Appendix D hereto.)

The Court of Appeals for the Seventh Circuit reversed the decision of the district court in an Order dated January 4, 1990. (See Appendix C hereto.) The court held, in a decision written by Judge Harlington Wood, that Dr. Hannon had failed to defeat the individual defendants' claims of qualified immunity because he had not demonstrated the existence of a clearly established property or liberty interest. More specifically, the majority reasoned that Dr. Hannon could not establish the existence of a property interest because his appointment was *void ab initio*. The Seventh Circuit stated that the Veterans Administration was without power to hire Dr. Hannon in the first instance and, therefore, the procedural rights normally afforded a tenured physician need not be provided to Dr. Hannon. The majority further reasoned that 38 U.S.C. § 4110, which requires a hearing be provided to a non-probationary employee charged with "inaptitutde, inefficiency or misconduct," was entirely inapplicable because Dr. Hannon's appointment was a nullity. The Court of Appeals for the Seventh Circuit then concluded that because Dr. Hannon failed to establish that he had either a property interest in his employment or a liberty interest in the circumstances surrounding his dismissal, the defendants were entitled to qualified immunity. (See Appendix C hereto.)

The reasoning relied upon by the majority, was strongly criticized in the dissent written by Judge Flaum, who contended that the rationale of the majority directly contravenes the

holding in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). Judge Flaum stated that the defendants could not be relieved of their statutory and constitutional obligations to provide a Veterans Administration employee a pre-termination hearing premised upon a unilateral determination that the appointment was void from its inception. Judge Flaum went on to state that the majority's attempt to distinguish *Loudermill* was unsuccessful because in both instances, the plaintiffs' initial appointments might have been illegal. (See Appendix C hereto.) Judge Flaum then concluded that the majority's opinion invited federal agencies to attempt to evade their constitutional obligations when terminating tenured employees by merely suggesting that the appointment was void in the first instance.

On February 13, 1990, the Seventh Circuit denied Dr. Hannon's Petition for Rehearing and Suggestion for Rehearing In Banc.

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING THE PROVISION OF NOTICE AND FAIR HEARING TO A TENURED FEDERAL EMPLOYEE WHO IS DISCHARGED FOR ONCE FAILING TO POSSESS THE NECESSARY QUALIFICATIONS, OR IN THE ALTERNATIVE, FOR FALSIFYING HIS EMPLOYMENT APPLICATION.

In *Cleveland Board of Education v. Loudermill,* this Court reaffirmed the basic proposition of constitutional law that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. 532, 546 (1985). The decision of the Seventh Circuit in this case seeks to evade this basic constitutional requirement by engaging in the legal fiction of assuming that Dr. Hannon's employment was a nullity from its inception despite seven years of employment. The analysis of the Seventh Circuit contravenes the reasoning and the holding in *Cleveland Board of Education v. Loudermill, supra.* In *Loudermill,* this Court expressly held that a public employer "cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why [the employee] should not have been hired in the first place." 470 U.S. at 539 n.5.

If the Seventh Circuit's holding and its application of *Loudermill* are not reviewed, the scope of the due process clause will be erroneously restricted. The decision in this case will have the impact of allowing state and federal employers to avoid their basic constitutional obligations through an evasion of actions arising under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) by merely "categoriz[ing] the reasons for firing employees as reflecting the reasons why they could not be hired in the first place." *Hannon*

v. Turnage, 892 F.2d 653, 663 (7th Cir. 1990) (dissenting opinion). (See Appendix C hereto.)

The basic premise of the Seventh Circuit's decision is that the very statutes under which Dr. Hannon was appointed and served for approximately seven years, did not give rise to a property interest protected by the Due Process Clasue. A review of the statutory framework demonstrates to the contrary. 38 U.S.C. § 4105 requires a physician be "be licensed to practice medicine. . . ."[3] The statute goes on to provide for a two-year probationary period of employment, at the same time recognizing that the board has a continual obligation to review the qualifications of physicians during this period of time. 38 U.S.C. § 4106. Once a Veterans Administration physician succeeds in advancing past the probationary period, he may be terminated solely on the basis of "charges of inaptitude, inefficiency, or misconduct" after he is provided with "notice and fair hearing." 38 U.S.C. § 4110.

A review of this statutory framework, accordingly establishes that a tenured Veterans Administration employee may be discharged for "inaptitude," which has been equated to the failure to hold the necessary qualifications, only after the agency provides the requisite procedures specified in the statute. *Hannon v. Turnage,* 892 F.2d at 663 (dissenting opinion). (See Appendix C hereto.) Consistent with this interpretation of the

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[3] There is no language in the statute that provides that a physician can not work for the Veterans Administration if he possesses a restricted license. This issue has been dealt with in the regulations. (See Appendix G hereto.) In the past, the regulations have required physicians to have an unrestricted license. (See Appendix G hereto.) Although the past regulations did not define what was meant by "unrestricted," a current circular by the agency sets out such a definition. (See Appendix H hereto.) Under this recent change in regulation, Dr. Hannon's license would not have been viewed as restricted. Moreover, this circular specifically sets up a procedure that allows physicians with restricted licenses to work for the Veterans Administration.

statute is a recent decision from the Fifth Circuit, which concluded that Section 4110 governs any disciplinary decision involving a Veterans Administration employee. *See, Neal v. Walters,* 750 F.2d 347, 350 (5th Cir. 1984). Furthermore, even if this Court concludes that the requirements of Section 4110 are not applicable to Dr. Hannon, Section 4106 clearly mandates that there be a board determination prior to the termination of a probationary employee. *Hannon v. Turnage,* 892 F.2d at 663 (dissenting opinion). (See Appendix C hereto.)

The termination of Dr. Hannon, without application of any of the procedural protections embodied in Section 4110 or 4106, clearly contravene the statutory framework. There is no language in these provisions that voids appointments made in violation of the terms of the statute or regulations. To the contrary, the statute provides that process be guaranteed to both probationary and tenured employees under a various set of circumstances including "inaptitude." 38 U.S.C. § 4106. There is no dispute that Dr. Hannon was not accorded any of the procedural protections set out by the statute prior or subsequent to his termination. Consequently, his discharge was in direct violation of the statutory framework which gave rise to reasonable expectation of continued employment guaranteed by the due process clause of the Fifth Amendment. *Id.* at 661 (dissenting opinion). (See Appendix C hereto.)

The conclusion of the Seventh Circuit that process was not warranted prior to Dr. Hannon's dismissal because his employment was void from its inception, is not only at odds with a reasonable interpretation of the statutory framework, but this holding also contravenes reality. Dr. Hannon was a non-probationary employee with the Veterans Administration, which he served for approximately seven years. The agency also gave the Doctor positive evaluations which resulted in significant promotions. The majority's analysis totally ignores this reality and this Court's admonition in *Loudermill:*

> The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully, he would not have been hired. He, therefore, lacked a "legitimate claim of entitlement" to the position. . . . For several reasons, we must reject this submission. . . . the argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job.

470 U.S. at 539 n.5.

An examination of the rationale behind *Loudermill* demonstrates that the Seventh Circuit's attempt, in this case, to distinguish the holding and reasoning embodied in *Loudermill* is erroneous. A review of the opinion establishes that the appellate court spent a significant amount of time attempting to distinguish *Loudermill* by reasoning that Dr. Hannon was terminated as a result of his failure to possess the requisite statutory qualifications, rather than his alleged falsification of his record. *Hannon v. Turnage,* 592 F.2d at 658-59. (See Appendix C hereto.)[4]

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[4] In the course of reaching the conclusion that Dr. Hannon was terminated for his failure to possess the necessary qualifications, rather than his alleged falsification of the record, the Seventh Circuit rejects the factual findings of the district court. The lower court found that a significant factor in the decision to terminate Dr. Hannon was the alleged falsification of this employment application. (See Appendix D hereto.) In fact, the memorandum of the General Counsel of the Veterans Administration, attached to the affidavit filed by defendants, established that Dr. Hannon's alleged falsification of his employment application was an alternative ground for his termination. Further support for this proposition is the fact that Dr. Hannon was denied his retirement benefits by a different federal agency on this basis. Accordingly, the Seventh Circuit violated precedent construing Rule 56 of the Federal Rules of Civil Procedure, which requires that the factual dispute in a motion for summary judgment should be construed in a light most favorable to a non-moving party. *Anderson v.*

What the Seventh Circuit fails to comprehend is that whatever rationale is utilized to explain the dismissal of Dr. Hannon, an appropriate analysis of the due process clause, which is consistent with *Loudermill,* dictates that Dr. Hannon be accorded the procedures specified by the relevant statutory provisions.

In *Loudermill,* this Court did not premise its conclusion that the actions of the school board were violative of the Constitution on the rationale offered by the board for their termination of a tenured employee. 470 U.S. at 540. To the contrary, this Court assumed the existence of a reasonable expectation of employment and rejected any arguments premised on the fiction that Loudermill should not have been hired. Perhaps the most significant aspect of the decision was the conclusion that an employer cannot evade his constitutional obligations by stating he would never have hired the person in the first instance. *Id.* By analogy, perhaps Dr. Hannon was either erroneously hired due to a lack of qualifications, or in the alternative, terminated because he allegedly falsified his application. Nonetheless, whatever the reason for his termination, under the holding and reasoning of *Loudermill,* he was entitled to his expectation of continued employment absent a hearing. *Hannon v. Turnage,* 892 F.2d at 661 (dissenting opinion). (See Appendix C hereto.) Accordingly, the failure to provide him with a hearing violated his clearly established constitutional rights.

Liberty Lobby, Inc., 477 U.S. 242 (1986); *United States v. Diebold, Inc.,* 369 U.S. 654 (1962). The majority opinion fails to do this under the circumstances of this case by concluding that Dr. Hannon was terminated solely as a result of his failure to have the necessary qualifications. Accordingly, the appellate court then misapplied the doctrine of qualified immunity by first assuming that the Veterans Administration terminated Dr. Hannon due to his failure to possess the necessary qualifications and then concluding that Supreme Court precedent would only find a property interest if the termination were as a result of falsification of an employment application as opposed to the failure to have the necessary qualifications. *Hannon v. Turnage,* 892 F.2d at 656-57. (See Appendix C hereto.)

The Seventh Circuit's conclusion that Dr. Hannon failed to defeat the defendants' claim of qualified immunity because he did not establish a property interest in continued employment with the Veterans Administration warrants consideration by this Court. Moreover, the First Circuit has adopted a similar analysis by concluding that a state employee hired in violation of statutory or regulatory authority may be fired without process because such an appointment is void. *Rosario-Torres v. Hernandez-Colon,* 889 F.2d 314 (1st Cir. 1989); *Kaufman v. Puerto Rico Tel. Co.,* 841 F.2d 1169 (1st Cir. 1988).

Thus, both the Seventh and First Circuits have utilized similar analysis, which have the impact of denying governmental employees their procedural rights guaranteed by the respective due process clauses of the Fifth and Fourteenth Amendments, by relying on a legal fiction that the employees were never hired. These decisions clearly warrant consideration by this Court because the appellate courts have engaged in an analysis that could severly and erroneously restrict the contours of the Fifth and Fourteenth Amendments. Finally, the granting of certiorari is warranted because these appellate courts have directly ignored the admonition of this Court in *Loudermill,* that public employers cannot deprive their employees of constitutionally guaranteed procedure by rephrasing "the basis for termination as a reason why [a public employee] should not have been hired in the first place." *Loudermill,* 470 U.S. at 539 n.5. The ability of courts to label an employment contract void from its inception cannot be utilized as a method of avoiding constitutional safeguards.[5]

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[5] The rationale and result underlying these decisions of the Seventh and Fifth Circuits also is at odds with a fairly recent decision of the Second Circuit. In *Dwyer v. Regan,* the Second Circuit rejected an attempt by a city employer to abolish a position without the provision of process. 777 F.2d 825 (2d Cir. 1985) The Court reasoned that the mere fact that the city stated a different reason for termination than the reason provided in the statute creating the property interest did not negate the need for a hearing. *Id.* at 831. Accordingly, the Second Circuit concluded it was necessary to utilize process to test the reason for termination.

II. MUTUAL EXPLICIT UNDERSTANDINGS BETWEEN A FEDERAL AGENCY AND TENURED EMPLOYEE, WHO WAS KNOWINGLY HIRED IN COMPLIANCE WITH STATUTORY AUTHORITY, BUT IN VIOLATION OF AGENCY REGULATIONS, AND SUBSEQUENTLY TERMINATED FOR VIOLATING THOSE SAME REGULATIONS, MANDATES THE PROVISION OF NOTICE AND A FAIR HEARING.

Not only has this Court recognized that property interests may be created by statute and ordinance, but it is also well accepted that the notion of property includes a broad range of interests that may arise out of implied contracts in addition to existing rules or understandings. *Cleveland Board of Education v. Loudermill,* 470 U.S. at 538; *Bishop v. Wood,* 426 U.S. 342, 344 (1976); *Perry v. Sindermann,* 408 U.S. 593, 601 (1971). Although the Seventh Circuit accepts the basic premise that an entitlement to public employment may arise through mutually explicit understandings between an employee and his superiors, the appellate court expressly rejected the notion that such a property interest arose under the circumstances of this case. *Hannon v. Turnage,* 892 F.2d at 658. (See Appendix C.)

The basis for the appellate court's conclusion that understandings between Dr. Hannon and his superiors did not give rise to a property interst are twofold: First, the Seventh Circuit reasoned that a property interest in continued employment could not have arisen as a result of any informal assurances because the relevant regulations and statutes invalidated plaintiff's appointment; and second, the court reasserted its claim that Dr. Hannon had no property interest in his employment with the agency because the Veterans Administration lacked the authority to hire him. *Hannon v. Turnage,* 892 F.2d at 658. (See Appendix C hereto.) Despite respondents contentions to the contrary, this Court's holding in *Perry v. Sindermann* supports the conclusion that informal understandings between Dr.

Hannon and his superiors did give rise to a property interest under the circumstances of this case. Accordingly, the erroneous application of this precedent and the unwarranted restriction of the notion of property requires this Court's consideration.

In *Perry v. Sindermann,* this Court expressly held that

> "property interests" subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing.

408 U.S. at 601. On the basis of this reasoning, this Court concluded that a teacher had a legitimate entitlement to continued employment despite the lack of a formal tenure system.

By analogy, Dr. Hannon had a reasonable expectation of continued employment with the Veterans Administration premised upon existing rules and understandings. The agency was aware of the limitations on his licenses and regularly reported to state agenices on his behalf. Despite the suggestion of the Seventh Circuit, there is nothing in the statutory framework that invalidated Dr. Hannon's appointment. The relevant statutory provision, 38 U.S.C. § 4105, only required a physician be "be licensed to practice medicine." (See Appendix F hereto.) The relevant regulations, however, did require Dr. Hannon to possess an unrestricted license. (See Appendix G.) Nonetheless, these regulations neither invalidated Dr. Hannon's appointment nor should their existence have denied him his due process rights.

There is, however, a division among the circuits with respect to the question whether mutual understandings and customs may give rise to a property interest when those understandings

are contrary to the express provisions of statutes or regulations. Three circuits, including the Seventh Circuit, have held that reasonable reliance on a promise from state or agency officials is sufficient to create a property interest despite law and regulations contravening the existence of a property interest. *Orloff v. Cleveland,* 708 F.2d at 372 (9th Cir. 1983) (due process claim to continued employment with VA arose on the basis of prior treatment after expiration of contract date); *Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983) *aff'd,* 466 U.S. 377 (1984); *e.g., Soni v. Board of Trustees,* 513 F.2d 347 (6th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976); *but see, Noel v. Andrus,* 810 F.2d 1388 (5th Cir. 1987); *Baden v. Koch,* 799 F.2d 825 (2nd Cir. 1980). Accordingly, this Court should grant certiorari to assess whether informal understandings that contravene a statute or regulation may give rise to a reasonable expectation of a property interest.

Even in the face of authority holding that an interest, which is premised upon the existence of mutual understandings, cannot be recognized under the due process clause as a result of the existence of conflicting regulations and statutes, Dr. Hannon still retained a constitutional entitlement to continued employment under the circumstances of this case. The Seventh Circuit premised its rejection of the existence of mutual understandings giving rise to a property interest on the notion that Dr. Hannon's appointment contravened the statute and regulations and, as a result, the agency lacked the authority to hire him. *Hannon v. Turnage,* 892 F.2d at 658. (See Appendix C hereto.) The current state of the law conflicts with these conclusions.

In a recent circular executed by John A. Gronvall on behalf of the Veterans Administration, the agency altered its earlier regulations by unilateral action. (See Appendix H hereto.) As a result, physicians with restricted licenses now can be employed by the agency. This circular demonstrates that the agency is not

without authority to hire physicians with restricted licenses;[6] nor was it necessary for the Veterans Administration to engage in a formal rule making procedure in order to effectuate this change. More importantly, the circular demonstrates that Dr. Hannon's license would not have been considered "restricted" under the current status of the law. Accordingly, the Seventh Circuit's contention that the Veterans Administration was without power to hire Dr. Hannon, must be automatically rejected. Thus, Dr. Hannon's reliance on informal understandings did not contravene the agency's statutory authority and, therefore, gave rise to a constitutionally protected property interest.

This Court should resolve the conflict between the Circuits that arises out of the question whether mutually explicit understandings can give rise to a property interest in the face of conflicting statutes or regulations. In addition, this Court should take the opportunity to reject the claim that an agency is without power to take certain actions in violation of its regulations in those instances that the regulations may be changed by unilateral agency action.

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[6] The argument might also be made that this circular helps define what the agency had always meant in its regulations when the Veterans Administration barred the hiring of a physician with a restricted license. The relevant circular provides that:

> the state licensing board has suspended the licensee's ability to independently prescribe controlled substances or other drugs, selectively limited one's authority to prescribe a particular type or schedule of drugs; or accepted one's offer or voluntary/agreement to limit authority to prescribe.

(See Appendix H hereto.)

Under this definition, Dr. Hannon did not hold a restricted license and, therefore, his termination was entirely erroneous.

III. THE DECISION BELOW ERRONEOUSLY RELIED UPON THE CONTRACTUAL DEFENSE OF *VOID AB INITIO* TO INEQUITABLY VOID BOTH THE CONTRACTUAL AND DUE PROCESS RIGHTS OF A TENURED FEDERAL EMPLOYEE WHEN THE AGENCY AND ITS REPRESENTATIVES KNOWINGLY HIRED THAT EMPLOYEE IN COMPLIANCE WITH ITS STATUTORY AUTHORITY, BUT IN VIOLATION OF ITS THEN CURRENT REGULATIONS.[7]

The basis for the Seventh Circuit's decision that Dr. Hannon did not have a constitutionally protected property interest in continued employment, with the Veterans Administration, was that the federal agency ded not have the authority to hire petitioner in the first instance. *Hannon v. Turnage,* 892 F.2d at 659. (See Appendix C hereto.) The appellate court then engaged in a legal fiction by concluding that Dr. Hannon's appointment was void, in the first instance, which the Court reasons, in turn, negated any constitutional interest he might have had in continued employment with the Veterans Administration. It necessarily follows, under this analysis, that any right Dr. Hannon had to due process also was invalidated. Noticeably absent from either the decision of the Seventh Circuit or the reasoning of *Kaufman v. Puerto Rico Tel. Co.,* 841 F.2d 1164 (1st Cir. 1988), is any authority that supports the proposition that it is appropriate, either as a legal, contractual or equitable matter, to void an employment contract and the associated constitutional right. Moreover, even if it is eventually determined that Dr. Hannon's appointment was violative of the regulations, this fact cannot negate the reality of his service, a reasonable expectation of continued employment or necessarily nullify constitutional expectations that flowed from his tenure with the agency.

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[7] See note 6 *supra* for the argument that the hiring of Dr. Hannon was not in violation of the Veterans Administration Regulations.

The use of contractual defense is unprecedented and untenable under these circumstances.

Conspicuously absent from both the decision of the Seventh Circuit and the opinion of the First Circuit in *Kaufman v. Puerto Rico Tel. Co., supra,* is any legal precedent in support of the proposition that a contract for the services of a governmental employee may be rendered void due to the existence of a contravening regulation of which officials are aware. A review of basic principles of contract law do not support such a result. Accordingly, defendants should be estopped not only from relying on a defense that has the effect of negating their contractual obligations, but more seriously, their constitutional obligations.

Although it is a well accepted rule that a court will not ordinarily allow recovery pursuant to the terms of an illegal contract, it does not necessarily follow that unlawful agreements are automatically void. If denial of relief is disproportionately inequitable the right to recovery will not be denied. 14 Williston on Contracts, S 1630H (3d ed. 1972). As a general rule, illegal contracts are considered unenforceable only when the express language of a statute provides that contracts contravening its terms are void, *see Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 18 (1979), or where "the interest of enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *California Pacific Bank v. Small Business Administration,* 557 F.2d 218, 224 (9th Cir. 1977), *citing, Restatement (Second) of Contracts* § 320(1) at 53 (Tent. Draft No. 12, March 1, 1974). Under the circumstances of this case, the defendants seek not only to void an employment contract, but also the associated constitutional rights.

The former principles have been utilized in the context of a private party seeking to estop a governmental unit or its agents from asserting the illegality of an agreement that was previously executed or condoned. Thus, estoppel has been used against the government where "justice and fair play require it, for example where the government's wrongful conduct threatens to work a

serious injustice and if the public interest could not be unduly damaged by the imposition of estoppel. . . ." *United States v. Lazy F C Ranch,* 481 F.2d 985, 989 (9th Cir. 1973); *see also, United States v. Wharton,* 514 F.2d 406 (9th Cir. 1975) (estoppel may be utilized against the government when there is reliance on governmental action).

The contours of the doctrine of estoppel in the context of governmental action have not been well defined. This Court has confirmed, however, that estoppel is an appropriate defense against governmental action when basic notions of fairness are implicated. *Moser v. United States,* 341 U.S. 41 (1951) In a recent decision the Court of Appeals for the District of Columbia appears to have taken a much more restrictive approach to the doctrine of estoppel by holding that "application to the government must be rigid and sparing." *ATC Petroleum, Inc. v. Sanders,* 860 F.2d 1104, 1111 (D.C. Cir. 1988)

The use of the doctrine of estoppel to bar a governmental agent or body from relying upon a claim or defense that an employment contract is void is currently an open question and, therefore, requires consideration by this Court. Under the circumstances of this case the agents of the Veterans Administration, who were aware of Dr. Hannon's restricted license, should be barred from asserting the contractual defense of *void ab initio* and, more seriously, prevented from negating the associated constitutional expectation of process. Such a conclusion is consistent with the general notion that the doctrine of estoppel "is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on the litigant's conduct." *ATC Petroleum, Inc. v. Sanders, Id.* Furthermore, review is warranted because current law does not establish the extent to which a governmental body should be allowed to void a contract and the associated constitutional rights.

CONCLUSION

This Court ruled in *Cleveland v. Loudermill,* that governmental officials can not evade their constitutional obligations under the due process clause by merely relabeling their basis for the termination of a public employee as the reason they would not have employed that particular employee in the first instance. 470 U.S. 535, 546 (1985). The Seventh Circuit's attempts to distinguish the facts of this case from *Loudermill* are erroneous. First, a review of the statutory framework demonstrates that the Veterans Administration was not without authority to hire Dr. Hannon. Perhaps, more impcrtantly, such an analysis is insignificant because he, in fact, worked for the agency. Finally, the attempt to differentiate this Court's holding in *Loudermill,* by reasoning that Dr. Hannon was fired because of his failure to meet the requisite statutory or regulatory requirements, as opposed to falsifying his application, must be rejected as a distinction without any legal significance. Finally, the finding is unsupported by the record.

Under this Court's analysis in *Loudermill* the reason why a public official is dismissed is of no significance to the rule that a tenured employee must be accorded the requisite process to determine whether termination is in fact appropriate. Both the holding and reasoning of the Seventh Circuit contravene this premise. Unless this Court speaks to the deficiencies of both the Seventh and First Circuits' analysis, the dangers identified by the dissent in *Hannon* may come to pass:

> The majority would invite the government to avoid its constitutional and statutory obligations. All a federal agency would need to do to evade a *Bivens* action under the majority's holding, is to categorize the reasons for firing employees as reflecting why they could not be hired in the first place. No hearing would ever be necessary though the agency was bound by the statutory assurances...

Hannon v. Turnage, 892 F.2d at 663 (dissenting opinion) (see appendix C hereto).

The erroneous interpretation and application of *Loudermill* warrants consideration and correction by this Court. Furthermore, the decision of the Seventh Circuit has additional implications for an analysis of the contours of the due process clause. There appears to be a split in the circuits with respect to the question whether mutually explicit understandings, which often give rise to protections under the due process clause, can be accorded protection when those understandings are contrary to statutory provisions or regulations. Although it is not altogether clear that such inconsistencies existed under the circumstances of this case, the Seventh Circuit does rest its holding that there was no protectable interest on the belief that the understandings between the parties were violative of statutes or regulations. The disagreement among the circuits with respect to this constitutional question makes this case ripe for review.

Finally, granting of this petition would allow this Court to refine the contours of the doctrine of estoppel in the context of governmental action. This question is of particular significance under the circumstances of this case because Petitioner is attempting to utilize the doctrine, not only to prevent the negation of contractual rights but also the negation of constitutional rights.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-751

Donald W. Hannon,
Petitioner

v.

Edward J. Derwinski, Administrator of the
Veterans Administration, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 13, 1990.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of April, 1990.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

February 13, 1990

No. 88-2130

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

DONALD W. HANNON, M.D.,
Plaintiff-Appellee,

vs.

THOMAS K. TURNAGE, Administrator of the Veterans Administration, and
JOHN GRONVALL, Chief Medical Director of the Veterans Administration,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois, Benton Division.

No. 87 C 4065
James L. Foreman, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by plaintiff-appellee on January 18, 1990, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in bance* be, and the same is hereby, DENIED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2130

DONALD W. HANNON, M.D.,
Plaintiff-Appellee,

v.

THOMAS K. TURNAGE, Administrator of the Veterans Administration, and
JOHN GRONVALL, Chief Medical Director of the Veterans Administration,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois, Benton Division.
No. 87 C 4065—**James L. Foreman,** *Chief Judge.*

ARGUED SEPTEMBER 11, 1989
DECIDED JANUARY 4, 1990

Before BAUER, *Chief Judge,* WOOD, JR., and FLAUM, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Dr. Donald W. Hannon brought this action challenging the termination of his employment as chief of surgery at the Veterans Administration Medical Center ("VAMC") in Marion, Illinois. Dr. Hannon contends that Thomas K. Turnage, administrator of the Veterans Administration ("VA"), and Dr. John Gronvall, chief medical director of the VA, deprived him of liberty and property without due process of law when they discharged him from his position.

Turnage and Gronvall moved for summary judgment on the grounds of qualified immunity. The district court had jurisdic-

tion over Dr. Hannon's claim under 28 U.S.C. § 1331. We have jurisdiction to hear this interlocutory appeal of a denial of qualified immunity on a motion for summary judgment under the principles of 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The district court denied Turnage and Gronvall's motion, and they now appeal. For the reasons stated below, we reverse.

I. FACTUAL BACKGROUND

In 1979, Dr. Hannon applied for an appointment as a staff surgeon at the VA hospital in Grand Junction, Colorado. At that time, federal statute and VA regulations required all VA physicians to have full, unrestricted state licenses. *See* 38 U.S.C. § 4105(a)(1); DM & S Supplement to VA Manual MP-5, pt. II, ¶ 2.04(h)(1). When Dr. Hannon applied for the staff surgeon position, he did not have an unrestricted license. Although Dr. Hannon had previously possessed unrestricted licenses in the states of California, Washington, and Minnesota, disciplinary action had revoked, suspended, or inactivated all of these licenses. It was not until 1986 that Dr. Hannon once again received a full, unrestricted license from the state of Minnesota.

Dr. Hannon's VA application specifically asked if he ever had a license to practice revoked or suspended. Dr. Hannon left the response to this question blank. Nowhere on the application did Dr. Hannon disclose the state disciplinary proceedings. The application forms required Dr. Hannon to certify that his answers were true and complete to the best of his knowledge and belief.

The VA subsequently appointed Dr. Hannon to a position as staff surgeon at the VA hospital in Grand Junction, Colorado. The VA later transferred him to facilities in Michigan, Texas, and Illinois. In 1983, the VA promoted Dr. Hannon to chief of surgical service at the VAMC in Marion, Illinois.

Prompted by charges of incompetent doctors in VA hospitals, the VA's Office of Inspector General began a 1986 nation-

wide audit of the licensure status of all VA doctors. The audit intended to trace all disciplinary actions involving VA doctors. As a result of the audit, the VA's Central Office made inquiries into Dr. Hannon's licensing history. The above facts were provided to the VA's general counsel who advised that the VA's own regulations required Dr. Hannon's discharge because Dr. Hannon failed to meet the appropriate qualifications at the time of appointment. Thus, on June 23, 1986, Dr. Hannon's supervisor informed him that he was terminated effective that same day. Dr. Hannon was not provided with prior written notice of the discharge decision, written reasons for his termination, any kind of hearing, or a chance to respond to the charges against him. The director of the VAMC stated to the media only that Dr. Hannon was no longer employed there and that the media would have to obtain further information from Dr. Hannon directly.

Almost four months after Dr. Hannon's discharge, the VA released the *Report of the Audit of the Inspector General.* This document published the results of the audit that eventually led to Dr. Hannon's termination. The report did not mention any doctor by name or even identify geographic regions. Based on the report, the news media published stories that sixty percent of the VA doctors with licensing problems were disciplined for drug abuse or laxity in drug prescription and that twenty-four VA doctors had their licenses suspended or revoked chiefly for drug-related misconduct.

In February 1987, Dr. Hannon tried to obtain $30,000 in retirement funds. The Office of Personnel Management turned down this request after learning from the VA the reason for Dr. Hannon's termination.

Dr. Hannon then brought this suit, alleging that the defendants deprived him of property and liberty interests without due process in violation of the fifth amendment. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S.

388 (1971). The defendants moved for summary judgment on the basis of qualified immunity, and the district court denied this motion. The district court reasoned that Dr. Hannon was a nonprobationary employee. Considering *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) dispositive, the district court rejected the defendants' argument that a person "who is illegally appointed by dishonestly filling out an employment application has no property right." In addition, the district court found that the VA's limited dissemination of the circumstances surrounding Dr. Hannon's dismissal implicated his liberty interests. Because the defendants moved for summary judgment on the basis of qualified immunity, the trial court did not consider whether Dr. Hannon had pleaded any statutory causes of action.[1]

II. DISCUSSION

The defendants contend that they did not violate any of Dr. Hannon's clearly established rights and are thereby entitled to qualified immunity. The defendants alternatively argue that they took no personal action that could have exposed them to liability. Because we agree that the defendants did not violate any of Dr. Hannon's clearly established rights, we do not reach the other issue.

A. *General Principles*

The doctrine of qualified immunity shields government officials from litigation of discretionary functions. *See Klein v. Ryan,* 847 F.2d 368, 371 (7th Cir. 1988); *see also Harlow v.*

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[1] Dr. Hannon has divided his complaint into three counts. The first count clearly pleads a *Bivens* cause of action; the second and third counts plead violations of 38 U.S.C. §§ 4110 and 4106 respectively. It is conceivable that Dr. Hannon intended to plead implied statutory causes of action under these two sections, but Dr. Hannon does not raise this theory on appeal. Thus, we will interpret counts two and three only as pleading that sections 4106 and 4110 give plaintiff a statutory entitlement and thereby a property interest in his job.

Fitzgerald, 457 U.S. 800, 818 (1982). Officials cannot receive qualified immunity if their conduct violates clearly established constitutional rights, such that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 107 S. Ct. 3034, 3039 (1987); *see also Harlow,* 457 U.S. at 818; *Connor v. Reinhard,* 847 F.2d 384, 387-88 (7th Cir.), *cert. denied,* 109 S. Ct. 147 (1988). One recent commentator has suggested that the law is unclear and the burden should be on the defendant to establish the lack of a clearly established right. *See* Kinport's, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions,* 23 Ga. L. Rev. 597, 634-42 (1989). Since the Supreme Court's decision in *Davis v. Scherer,* 468 U.S. 183, 197 (1984), the law in this circuit has been well settled that the plaintiff bears the burden of proving a clearly established right. *See, e.g., Lenea v. Lane,* 882 F.2d 1171, 1177 (7th Cir. 1989); *Alvarado v. Picur,* 859 F.2d 448, 452 (7th Cir. 1988); *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir.), *cert. denied,* 109 S. Ct. 497 (1988); *Klein,* 847 F.2d at 371; *Conner,* 847 F.2d at 388; *Abel v. Miller,* 824 F.2d 1522, 1534 (7th Cir. 1987); *Kompare v. Stein,* 801 F.2d 883, 892 (7th Cir. 1986); *LeClair v. Hart,* 800 F.2d 692, 696 (7th Cir. 1986).

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When we review the denial of a motion for summary judgment on the basis of qualified immunity, our inquiry is limited solely to the issue of whether the law was well established at the time of the relevant conduct. *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *Conner,* 847 F.2d at 388; *Klein,* 847 F.2d at 371.

B. *Property Interest*

Dr. Hannon has not proved the existence of any property right that the defendants might have violated, let alone proved the existence of a clearly established right.

For Dr. Hannon to defeat the defendants' claim of qualified immunity, he must show that he had a clearly established property interest in continued employment with the VA. *See Board of Regents v. Roth,* 408 U.S. 564, 569 (1972) (requirements of procedural due process only encompass the Constitution's protection of life, liberty, and property). When the government gives its employees assurances of continued employment a property interest arises. *See* R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 17.5(d) (1986). The government usually manifests these assurances by laws and regulations. Thus, property interests are generally created and defined by laws and regulations, *see Roth,* 408 U.S. at 577, but can also arise through principles of contract law, *see Vail v. Board of Educ.,* 706 F.2d 1435, 1437 (7th Cir. 1983), *aff'd,* 466 U.S. 377 (1984).

In this case, the government, acting through the VA, gave Dr. Hannon no assurances of continued employment. In 1979, when Dr. Hannon applied for the VA appointment, he did not meet the qualifications listed in the United States Code and the VA's own regulations. The VA was without authority to hire Dr. Hannon, and his appointment was void from the day he received it.[2] Dr. Hannon cannot now rely on this void appointment as an assurance of continued employment: the government's laws and regulations told Dr. Hannon that he had no right to his VA job.

Dr. Hannon argues that nothing in the record indicates he failed to meet the relevant qualifications at the time of his appointment. The defendants assert, by affidavit and supporting exhibits, that Dr. Hannon did not possess an unrestricted

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[2] In 1986, approximately seven years after his initial appointment, Dr. Hannon did receive an unrestricted medical license from Minnesota. This subsequent medical license is irrelevant to the issue of whether Dr. Hannon possessed the necessary qualifications at the time of appointment.

medical license at the time of his appointment. As the party moving for summary judgment, the burden is on the defendants to establish uncontroverted facts supporting their argument. The plaintiff, however, cannot rest on mere unsupported denials, and he must come forward with contradictory evidence of his own to establish a genuine issue of material fact. *Anderson v. Liberty Lobby,* 477 U.S. 242, 256 (1986); *Smart v. State Farm Ins. Co.,* 868 F.2d 929, 931 (7th Cir. 1989). Because courts should decide the issue of qualified immunity before proceeding with discovery, *see Mitchell v. Forsyth,* 472 U.S. 511, 526-27 (1985), the section 1983 plaintiff should not be required as a matter of routine to come forward with evidence contradicting the defendant's facts that support a claim of qualified immunity, *cf. Anderson,* 477 U.S. at 250 n.5 (nonmoving party may be relieved of its burden where discovery has not yet taken place); Fed. R. Civ. P. 56(f) (court may stay or deny motion for summary judgment where further discovery is necessary). In this case, Dr. Hannon controls the facts relevant to the inquiry of whether he possessed the necessary qualifications, and it would not burden him to produce these facts. Dr. Hannon, as the nonmoving party, cannot simply deny the defendants' facts when he could easily controvert them by coming forward with contradictory evidence.

We agree with the defendants that 38 U.S.C. §§ 4106, 4110 do not give Dr. Hannon a statutory entitlement to specified procedures before termination from his VA position. Section 4106 provides that certain VA-appointed health professionals shall serve a two-year probationary period and shall be separated from the VA unless a review board finds them not fully

qualified and satisfactory.[3] Evidently, Dr. Hannon argues that the completion of a two-year probationary period without separation from the VA gives him an entitlement to continued VA employment. However, section 4106 does not apply to persons invalidly appointed; the statute speaks only to persons with valid appointments. Section 4106 itself states that appointments "shall be made only after qualifications have been satisfactorily established in accordance" with VA regulations. 38 U.S.C. § 4106(a). Because Dr. Hannon's appointment was void ab initio, section 4106 does not apply to him.

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[3] 38 U.S.C. § 4106 provides:

> (a) Appointments of physicians, dentists, podiatrists, optometrists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements.
>
> (b) Such appointments as described in subsection (a) of this section shall be for a probationary period of two years and the record of each person serving under such appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Administrator, and if said board shall find such person not fully qualified and satisfactory such person shall be separated from the service.

Section 4110 is also inapplicable to this case.[4] Section 4110 requires the chief medical director of the VA to appoint disciplinary boards to hear charges of inaptitude, inefficiency, or misconduct.[5] Because the VA did not fire Dr. Hannon for any of these enumerated bases, the hearing rights of section 4110 do not apply. Dr. Hannon was not dismissed because of inaptitude, inefficiency, or misconduct, but because his VA appointment was void.

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[4] 38 U.S.C. § 4110 states:

> (a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards, each such board to consist of not less than three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of the charges.
>
> . . . .
>
> (d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation. The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

[5] The dissent argues that section 4110 could be read broadly to apply to almost any disciplinary action by the VA. While some courts have broadly interpreted section 4110 to cover almost any adverse employment *action* by the VA, *see, e.g., Neal v. Walters,* 750 F.2d 347, 350 (5th Cir. 1984), we are unable to find authority for the proposition that section 4110 covers *charges* other than inaptitude, inefficiency, or misconduct.

Dr. Hannon also argues that an entitlement to his position arose through mutually explicit understandings between him and his superiors. A property interest can arise through legitimate and reasonable reliance on a promise from the government, *see Perry v. Sinderman,* 408 U.S. 593, 602 (1972); *Vail,* 706 F.2d at 1440, and Dr. Hannon cites cases where courts found a fired government employee to have a property interest through informal assurances despite statutes, regulations, or operating procedures that ostensibly voided such a property interst, *see, e.g., Vail,* 706 F.2d at 1439 (teacher's two-year contract possibly beyond the power of school board); *Soni v. Board of Trustees,* 513 F.2d 347, 349 (6th Cir. 1975) (foreign-born university professor had reasonable expectation of continued employment despite university regulation prohibiting aliens from holding tenured faculty positions), *cert. denied,* 426 U.S. 919 (1976). In none of these cases, however, did regulations or statutes completely nullify the validity of plaintiff's appointment. Ruling for the plaintiff, the *Vail* court even found that continued employment of a schoolteacher would not have been an ultra vires act for the governmental defendant. *Vail,* 706 F.2d at 1439-40. Dr. Hannon's claim more closely resembles those cases where we have held that a government employee cannot receive reasonable assurances of continued employment from government officials that do not have the authority to give such assurances. *See, e.g, Wolf v. City of Fitchburg,* 870 F.2d 1327, 1333-35 (7th Cir. 1989); *Common v. Williams,* 859 F.2d 467, 471-72 (7th Cir. 1988); *Smith v. Board of Educ.,* 853 F.2d 517, 521 (7th Cir. 1988); *Shlay v. Montgomery,* 802 F.2d 918, 923 (7th Cir. 1986). The VA had no authority to hire Dr. Hannon, and thus he could not legitimately rely on any assurances of continued employment.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) does not require a contrary result. In *Loudermill,* the defendant school board had fired the plaintiff from his job as a security guard. On his job application, the plaintiff untruthfully stated that he had never been convicted of a felony. The Su-

preme Court rejected the argument that a government employee obtains no property interest where the employment was obtained by lying on the job application. *Id.* at 539 n.5. The defendant in *Loudermill* had fired the plaintiff for falsifying his job application. *Id.* In the present case, Dr. Hannon was not fired for falsifying his job application but for failing to possess the necessary qualifications at the time of his appointment.[6]

The distinction between *Loudermill* and this case is crucial. In *Loudermill,* the school board had the authority to hire the plaintiff even if it had known about his criminal past. In other words, the *Loudermill* defendant was not prohibited by law from hiring the plaintiff. The VA, however, could not have hired Dr. Hannon had it known that he did not meet the statutory and regulatory requirements for the appointment:[7] federal statutes and regulations barred the VA from properly hiring Dr. Hannon. Thus, even if it so desired, the VA could not give Dr. Hannon any legitimate assurances of continued employment.

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[6] The dissent believes that a factual dispute exists as to whether the VA fired Dr. Hannon because he falsified his employment application or because he failed to meet statutory and regulatory qualifications. If the former is true, then *Loudermill* would clearly be applicable to this case. Our examination of the record reveals that the VA fired Dr. Hannon for failing to be fully qualified at the time of his appointment. As evidence of the VA's reason for terminating him, Dr. Hannon points toward a memorandum from the VA's general counsel that discusses Dr. Hannon's case. In the memorandum, the VA's general counsel alternatively explores the possibility that Dr. Hannon could be fired for falsifying his employment application and concedes that, in this event, a post-termination hearing would be necessary under the VA's own statutory procedures. The general counsel, however, proceeds to state that Dr. Hannon will be terminated for failure to meet the required qualifications at the time of his appointment, making a hearing unnecessary.

[7] VA regulations also require termination for any employee who fails to meet statutory requirements for employment. *See* DM & S Supplement to VA Manual MP-5, pt. II, ¶ 9.09(b).

The reasoning of *Kauffman v. Puerto Rico Telephone Co.*, 841 F.2d 1169 (1st Cir. 1988) is more persuasive to the facts of this case. The *Kauffman* plaintiffs had been appointed to government positions as political patronage. Eighteen months after their hire, these plaintiffs were dismissed on the grounds that their appointments were illegal. The First Circuit held that because the plaintiffs' appointments had occurred in violation of law, they were null and void. *Id.* at 1173. Thus, to the extent that the plaintiffs were hired on the basis of standards foreign to those set forth under Puerto Rican law, they could not benefit from the "property" status of their positions. *Id.* at 1174.

The *Kauffman* court likewise found *Loudermill* inappropriate to the question of whether a government employee can acquire a property interest where the employee's appointment was invalid. *Id.* at 1175. *Loudermill* was distinguished on three grounds: (1) the issue of whether the plaintiffs had property interests in their positions was squarely before the court; (2) there were no unresolved factual issues regarding the plaintiffs' dismissal; and (3) there was a dispute over whether plaintiffs were ever properly hired. *Id.* With facts similar to *Kauffman*, we believe the present case to be likewise distinguishable from *Loudermill*. The issue of whether plaintiff had a property interest in his employment is squarely before this court. There are no unresolved factual issues regarding Dr. Hannon's dismissal: there is no question he failed to meet the qualifications at the time of his appointment. Most importantly, unlike *Loudermill*, there is a dispute over whether the VA properly hired Dr. Hannon in the first place. The VA had no authority to employ Dr. Hannon, making his appointment null and void.

Like the *Kauffman* plaintiffs, Dr. Hannon can claim no property interest in continued employment with the VA. Because Dr. Hannon had no property interest, he had no right to a hearing before discharge. It is axiomatic that without a right to a hearing, Turnage and Gronvall could not have violated any of Dr. Hannon's clearly established rights. Thus, the defendants

are entitled to qualified immunity from Dr. Hannon's claim that they deprived him of property without due process of law.

C. *Liberty Interest*

Dr. Hannon has likewise failed to clearly establish a liberty interest that was implicated when the defendants dismissed him. Because Dr. Hannon had no clearly established liberty interest, the defendants are entitled to qualified immunity.

The dismissal of a government employee can implicate a liberty interest. *See Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). *See generally* R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 17.4(d) (1986). But not every government discharge will involve a liberty interest. *See Roth,* 408 U.S. at 572-75. A government employee's dismissal infringes a liberty interest where "(1) the individual's good name, reputation, honor or integrity are at stake by such charges as immorality, dishonesty, alcoholism, disloyalty, Communism, or subversive acts; or (2) the state imposes a stigma or other disability on the individual which forecloses other opportunities." *Munson v. Friske,* 745 F.2d 683, 693 (7th Cir. 1985); *accord Shlay v. Montgomery,* 802 F.2d 918, 923-24 (7th Cir.), *cert. denied,* 479 U.S. 937 (1986); *Elliott v. Hinds,* 786 F.2d 298, 302 (7th Cir. 1986); *Perry v. FBI,* 781 F.2d 1294, 1300 (7th Cir.) (en banc), *cert. denied,* 479 U.S. 814 (1986). Dr. Hannon alleges that the VA infringed his liberty interest by disseminating information regarding his dismissal.

For Dr. Hannon to prevail, even assuming that any information surrounding his dismissal was sufficiently damning to implicate a liberty interest, the government must still have participated in the dissemination of this information to the public. *Bishop v. Wood,* 426 U.S. 341, 348 (1976); *Shlay,* 802 F.2d at 924. The only information released to the public by the VA was a statement by Dr. Hannon's superior that he was no longer employed at the VAMC and a report generally outlining licensing problems within VA medical facilities. This information

can hardly be classified as stigmatizing or as a charge of gross misconduct; one permissible inference would even be that Dr. Hannon left the VAMC of his own volition. While some newspapers published reports more detailed than the information given out by the VA, there is no genuine issue of material fact that the VA did not provide these details,[1] and the VA is not responsible for information beyond that which it released.

Dr. Hannon also argues that the VA deprived him of a liberty interest when it provided the reason for his dismissal to the Office of Personnel Management ("OPM"). This information, however, was only provided after Dr. Hannon had asked the OPM for a refund of $30,000 in retirement funds. This argument fails for two reasons. First, except when interagency sharing of information stigmatizes the plaintiff throughout the federal government, *see Larry v. Lawler,* 605 F.2d 954, 958 (7th Cir. 1978), there is generally no abridgement of a liberty interest when the government circulates information among a limited number of agencies for a specified purpose, *see Perry,* 781 F.2d at 1301. Second, when a plaintiff requests a government agency to release information to another agency, that plaintiff cannot later claim that the communication impaired a liberty interest. *See Rich v. Secretary of the Army,* 735 F.2d 1220, 1227 (10th Cir. 1984). The VA's release of information to the OPM was for a specified purpose, and Dr. Hannon initiated this transfer of information by requesting retirement funds. Thus, Dr. Hannon cannot complain about the communications between the VA and the OPM.

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[1] In support of their motion for summary judgment, the defendants attached affidavits detailing what information was made public after Dr. Hannon's dismissal. To oppose these affidavits, Dr. Hannon only offers his own unsupported affidavit broadly stating that the VA publicized his termination. As we noted before, the party not moving for summary judgment cannot simply rest on mere denials of the moving party's evidence. Dr. Hannon's unsupported statements hardly create a genuine issue of material fact on this subject.

Lacking a liberty interest, Dr. Hannon was without a right to due process when the VA disseminated the information surrounding his dismissal. Because Dr. Hannon had no clearly established rights, the defendants are entitled to qualified immunity on his claim that they deprived him of a liberty interest without due process.

III. CONCLUSION

Because Dr. Hannon had neither a property interest in his employment nor a liberty interest in the circumstances surrounding his dismissal, the defendants are entitled to qualified immunity on his *Bivens* claims. Accordingly, we reverse the opinion of the trial court denying the defendants' motion for summary judgment and remand so that the trial court may enter judgment for the defendants.

REVERSED & REMANDED.

FLAUM, J., *Circuit Judge,* dissenting.

The majority would have this Court permit the Veteran's Administration ("VA") to deny a pre-termination hearing to an employee based on the VA's own subsequent determination that his appointment was initially in violation of VA regulations. Because Congress mandated in 38 U.S.C. §§ 4106 and 4110 that such determinations be made at a pre-termination hearing and not by ensuing administrative fiat, I respectfully suggest that a contrary result is warranted.

The Supreme Court, in *Cleveland Bd. of Educ. v. Loudermill* considered the termination of an employee of the Cleveland Board of Education who was fired from his job as a security guard. The employee had falsified his job application by stating that he had never been convicted of a felony when in fact he had been convicted of grand larceny. As part of their argument before the Supreme Court, the Cleveland Board of Education maintained that Loudermill had no property right in his con-

tinued employment because he had obtained the job by lying on his application. They argued that "had Loudermill answered truthfully he would not have been hired." *Loudermill,* 470 U.S. at 539 n.5. This is the same argument relied on by the majority. The majority holds that Dr. Hannon's appointment was void *ab initio* because he never held the qualifications necessary for the job. In other words, had the VA known of his lack of qualifications, Dr. Hannon could not have been hired.

The Supreme Court in *Loudermill,* however, firmly rejected this approach. The Court held:

> [T]he argument relie[s] on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

Id. Dr. Hannon, like Loudermill was hired, paid, evaluated, and promoted. He performed work for the VA in exchange for benefits. Perhaps his hiring was in error, but the fact remains that he was hired and held a job. As an employee of the VA, he was entitled to the same rights and benefits as other employees, including his expectation of continued employment absent a hearing. The majority has, contrary to *Loudermill,* allowed the VA to "rephras[e] the basis for termination as a reason why [he] should not have been hired in the first place." *Id.*

This is not to say that the VA could not terminate Dr. Hannon on the grounds that he failed to hold an unrestricted medical license or because he lied on his application. The requirement of a hearing merely allows him to contest these allegations before termination. If, for example, these allegations were untrue, then Dr. Hannon would have been wrongfully terminated. Yet the majority distinguishes this case from *Loudermill* by stating that in this case, as opposed to *Loudermill,* there is no dispute over whether Dr. Hannon was im-

properly hired. But the very purpose of a hearing would be to determine if there is such a dispute. Simply put, the VA could not have denied a hearing knowing there was no dispute until a hearing has been held to determine if there was a dispute.

The majority attempts to distinguish *Loudermill* on three factual grounds.[1] First, the majority states that the issue of whether the plaintiffs had property interests in their positions is squarely before this Court but was not in *Loudermill.* While the question of property interests was not the principal issue in *Loudermill,* the holding by the Court that there was such an interest was not dicta. It is a necessary holding of the case and was argued before the Corut. As such, I would not minimize it.

Second, the majority attempts to distinguish *Loudermill* on the basis that Loudermill was fired for lying while Dr. Hannon was fired for not having the necessary job qualifications. Respectfully, with the record in this case, and the Court's opinion in *Loudermill,* I cannot support this reading of the facts. In the present case, we cannot be certain why Dr. Hannon was fired and as we are not triers of fact, it is inappropriate for us to make this determination. An affidavit filed by the defendants points to a General Counsel's [of the VA] memo as setting forth the grounds for Dr. Hannon's termination. The memorandum expressly lists Dr. Hannon's falsification of his application as an alternative grounds for termination. Dr. Hannon asserts that this was *the* ground for termination, and factual disputes in a motion for summary judgment are to be construed in favor of the non-moving party, in this case Dr. Hannon. *United States v. Diebold Inc.,* 369 U.S. 654, 655 (1962) (per curiam).

Even if we accept that Dr. Hannon was terminated because he lacked the necessary qualifications rather than for lying, the

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[1] I recognize that the majority relies heavily on *Kauffman v. Puerto Rico Telephone Co.,* 841 F.2d 1169 (1st Cir. 1988) which distinguishes *Loudermill* on facts very similar to ours. To the extent I disagree with the majority, I also find *Kauffman* unpersuasive.

reasons for termination, in my judgment, cannot be distinguished from those in *Loudermill.* In *Loudermill,* all we are told is that Loudermill would not have been hired had he not lied on his job application. *Id.* We are never informed that he was fired because he lied rather than for not having the qualifications. Indeed, the fact that he would not have been hired had he not lied indicates otherwise because Loudermill could have told the truth and still not have been hired. We cannot, therefore, successfully distinguish the cases on the reasons for the employee's termination.

Finally, the majority further attempts to distinguish *Loudermill* by arguing that the appointment of Dr. Hannon in the instant case was illegal, whereas the appointment of the plaintiff in *Loudermill* might have been legal. On this basis, the majority argues that Dr. Hannon's appointment was void while Loudermill's appointment was valid. I find the majority's reasoning flawed, however, because we do not know whether Loudermill's appointment was illegal or merely imprudent. The Supreme Court in *Loudermill* did not examine Ohio law. More importantly, such an examination was not relevant to the Court's inquiry because either way, the fact remains that the plaintiffs in both cases actually held the jobs, legally or otherwise. In addition, Dr. Hannon's and Loudermill's expectations of continued employment were virtually identical regardless of whether Dr. Hannon's initial appointment was illegal. Arguably, both Dr. Hannon and Loudermill must have known that had their "secret" been discovered, their jobs would be in peril. Both would have had to realize that they obtained their jobs through less than accurate applications. And both had reason to believe that they might *not* be terminated if their secret got out: Loudermill could have believed this if the majority is correct that his appointment was not illegal; Dr. Hannon could have believed this because he possessed an unrestricted license at the time of his termination so it was legal for him to hold the job at that time.

I believe that the majority's attempt to distinguish *Loudermill* falls short of the mark. Based on the facts of these cases, it is my conclusion that *Loudermill* cannot be distinguished. Both plaintiffs could have been fired for lying or for failing to have the necessary qualifications for the job. In both cases, the government attempted to state that the employee had never been properly hired in the first place. In both cases, it is clear that the employee held the job and performed the work. And finally, in both cases, the government attempted to label the reason for termination as a reason they should not have been hired. In my view, *Loudermill* cannot be convincingly distinguished and we are bound to follow it as controlling Supreme Court precedent.

Dr. Hannon's expectations of continued employment absent a hearing are based on 38 U.S.C. §§ 4106 and 4110. Section 4106 provides for pre-termination hearings for employees during their two year probationary period. Subsection 4106(b) provides that a board shall review all appointments and all persons judged not to be fully qualified shall be separated from employment. Dr. Hannon was not separated during this period. After completion of the probationary period, Section 4110 governs dismissal from the VA. Section 4110 provides for a hearing when termination is for inaptitude, inefficiency, or misconduct, presumably the only times someone who had passed to probationary period could be fired. The term "inaptitude" arguably includes lack of qualifications. In addition, Section 4110 has been interpreted to cover any disciplinary action taken against a VA employee. *See Neal v. Walters,* 750 F.2d 347, 350 (5th Cir. 1984). Even if Section 4110 does not cover Dr. Hannon, it certainly does allow the VA to avoid the necessity of a board determination. A board determination of lack of qualifications would have been necessary had the VA found he lacked the necessary qualifications in the time Congress set forth for it to review qualifications, i.e., the probationary period. It would be anomalous to allow the VA to avoid a board determination

simply because the VA failed to find Dr. Hannon not qualified during the period set aside for such findings.

The policy behind the Supreme Court's holding in *Loudermill* is especially compelling here. The majority would invite the government to avoid its constitutional and statutory obligations. All a federal agency would need to do to evade a *Bivens* action under the majority's holding, is to categorize the reasons for firing employees as reflecting why they could not be hired in the first place. No hearing would ever be necessary though the agency was bound by the statutory assurances, such as those in sections 4106 and 4110, of job security. Even if one accepts the majority's distinguishing of *Loudermill* on the facts, in my view the policy behind *Loudermill* and sections 4106 and 4110 dictate a different result. The VA here made its own determination that Dr. Hannon was not qualified. Yet this is exactly the reason why a hearing is required: a hearing would permit Dr. Hannon to refute these charges. The majority in effect, would allow the VA to fashion a legal fiction that enables it to avoid the statutes governing its administration. I respectfully dissent.[2]

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[2] Because I disagree with the majority's holding that the requirements for qualified immunity are met, I must consider the defendant's alternative grounds for dismissal, namely that defendants Turnage and Gronvall, both Dr. Hannon's superiors at the VA, took no personal action against Dr. Hannon and therefore cannot be held liable. *See e.g. Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1356 (7th Cir. 1985) (dismissing a section 1983 claim because the plaintiff did not allege the defendant had actually participated). This claim was made to the district court during the motion for summary judgment although it is not mentioned in the district court's opinion. I believe that this claim is not subject to interlocutory appeal. Where a defendant seeks a review of a denial of a motion for summary judgment on the issue of qualified immunity, "review . . . is limited to the legal question of whether the law was well-established at the time of the conduct. *Conner v. Reinhard*, 847 F.2d 384, 388 (7th Cir. 1988). This claim is, therefore, not part of the qualified immunity claim. It goes, instead to the merits of Dr. Hannon's claim. Therefore, in my view, the defendant's second basis for dismissal is not properly before this court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 87-4065

DONALD W. HANNON, M.D.,
Plaintiff,

vs.

THOMAS K. TURNAGE, Administrator of the Veterans' Administration, and DR. JOHN GRONVALL, Chief Medical Director of the Veterans' Administration, the Veteran's Administration, and the United States,
Defendants.

MEMORANDUM AND ORDER

(Filed May 18, 1988)

FOREMAN, Chief Judge:

This matter is before the Court on a Motion for Summary Judgment filed by defendants Thomas K. Turnage and Dr. John Gronvall. Plaintiff's *Bivens* action alleges that the defendants violated his constitutional rights under the fifth amendment and 38 U.S.C. § 4101 *et seq.* when they terminated his Veterans' Administration ("VA") employment. Count I states that defendants intentionally deprived plaintiff of his property and liberty interests without due process of law in violation of the fifth amendment. Count II states that defendants' actions violated the plaintiff's right to notice and a fair hearing under 38 U.S.C. § 4110. Count III alleges that the defendants discharged plaintiff in violation of 38 U.S.C. § 4106. The gravamen of defendants' motion is that summary judgment in defendants' favor is proper because the defendants are entitled to qualified immunity.

Summary judgment is appropriate only where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P. 56. The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact. *Korf v. Ball State University,* 726 F.2d 1222, 1226 (7th Cir. 1984). The Court must view the evidence, and the reasonable inferences to be drawn therefrom, in the light most favorable to the party opposing summary judgment. Where the moving party fails to meet its strict burden of proof, summary judgment cannot be entered even if the opposing party fails to respond to the motion. *Yorger v. Pittsburgh Corning Corp.,* 733 F.2d 1215 (7th Cir. 1984).

Where the moving party has met its initial burden and the opposing party asserts the existence of a question of fact, the Seventh Circuit has identified two considerations to be used in determining whether summary judgment is proper. An adverse party responding to a properly made and supported summary judgment motion must first set forth specific facts showing that there is a genuine issue for trial. A party may not rest on mere allegations or denials of his pleadings; similarly, a bare contention that an issue of fact exists is insufficient to raise a factual issue. *Posey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir.), *cert. denied,* 464 U.S. 960 (1983). The Court must determine whether the non-moving party has established that there is a genuine issue as to that fact. Furthermore, the disputed fact must be material, that is, it must be outcome-determinative under the applicable law. *Egger v. Phillips,* 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied,* 464 U.S. 918 (1983).

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 819. The Seventh Circuit has

recently summarized the standard for assessing when a public official is entitled to qualified immunity:

> the Supreme Court refined the *Harlow* formula by emphasizing that the right allegedly violated may not be asserted at any level of generality. Rather, the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent. *Anderson v. Creighton,* 107 S.Ct. 3034, 3039 (1987) (citation omitted).
>
> What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wade v. Hegner,* 804 F.2d 67, 71 (7th Cir. 1986) (citing *Mitchell v. Forsyth,* 472 U.S. 511 (1985)). We often refer to closely analogous case law, decided before the public official acted or failed to act, to determine whether such legal norms existed at the pertinent time. *Kompare v. Stein,* 801 F.2d 883, 887 (7th Cir. 1986); *Lojuk v. Johnson,* 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied,* 474 U.S. 1067 (1986). Of course, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ." *Anderson,* 107 S.Ct. at 3039. However, it must be "sufficiently clear that a reasonable official would understand that what he is doing violates" such a clearly established right. *Id.*

Wrigley v. Greanias, No. 87-1623, slip op. at 6-7 (7th Cir. Mar. 22, 1988).

I. Termination of Plaintiff's Veterans Administration Employment.

Plaintiff was formerly the Chief of Surgical Service at the Veterans Administration Medical Center in Marion, Illinois. At the time of plaintiff's appointment, he had a restricted license to practice medicine. The law governing the qualifications of appointees states that in order to be eligible for appointment in the Department of Medicine and Surgery ("DM&S") as a physician, the applicant must "be licensed to practice medicine." 38 U.S.C. § 4105(a)(1). VA regulations require that an applicant's license to practice medicine be a "full, unrestricted license." (*See* Document 29, Appendix D: DM&S Supplement to VA Manual MP-5, Part II, Ch. 2, ¶ h). Provisions of the VA manual also require the immediate separation of employees who VA officials discover have failed to meet the qualifications for appointment. (*See* Document 29, Appendix D: VA Manual MP-5, Part II, Ch. 9, ¶ 6 & DM&S Supp.). On June 23, 1986, defendants terminated plaintiff's VA employment because plaintiff did not have an unrestricted license when he was hired in 1979. Defendant did not provide plaintiff with any notice, explanation of the evidence against him, or any opportunity to be heard prior to termination.

This Court observed in its October 23, 1987 Memorandum and Order that the Supreme Court has rejected defendants' argument that a plaintiff who is illegally appointed by dishonestly filling out an employment application has no property right. *Cleveland v. Board of Educ. v. Loudermill,* 470 U.S. 532, 539 n.5 (1985). The *Loudermill* case was decided more than a year prior to plaintiff's termination. Defendants seek to minimize *Loudermill's* importance by stating that defendants could not have reasonably known as a matter of law that their actions violated a clearly established right. (Document 29, at p.10). Defendants rely on the absence of any cases specifically holding that the VA regulations requiring separation of illegally appointed employees are unconstitutional.

The Seventh Circuit has held that a court should inquire "whether the *legal norms* governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wade v. Hegner,* 804 F.2d 67, 71 (7th Cir. 1986) (emphasis added). Hence, that the VA's regulations regarding termination had not yet been found unconstitutional is irrelevant if plaintiff had a clearly established right to a pre-termination hearing under the due process clause. The right to "some kind of a hearing" prior to discharge has been clearly established since 1972. *Board of Regents v. Roth,* 408 U.S. 564, 570 n.7 (1972); *Perry v. Sindermann,* 408 U.S. 593, 599 (1972); *see also Davis v. Scherer,* 468 U.S. 183, 192 n.10 (1984). In *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251 (7th Cir. 1985), the Seventh Circuit reiterated the procedural due process rights an employer must afford her employees:

> *Loudermill* authoritatively sets out the procedure that would be required by due process in this and any similar case. Public employees who can only be dismissed for cause are entitled to oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story prior to their discharge. *Id.* at 1495. This court has also determined that in "a garden variety summary dismissal" (i.e., not an unusual situation where pre-deprivation procedures would be impossible or impracticable), public employees are entitled to some form of pre-deprivation inquiry. *Schultz v. Baumgart,* 738 F.2d 231, 237-38 (7th Cir. 1984); *Smith v. Board of Education of Urbana School District,* 708 F.2d 258, 261 (7th Cir. 1983). In the context of public employment, as we noted in *Schultz,* due process requires -at a minimum - prior notice of and the reasons for the discharge and a meaningful opportunity to respond prior to termination. 738 F.2d at 235.

Id. at 1265 (footnote omitted).

The Court finds that at the time of plaintiff's termination, clearly-established law required that defendants afford plaintiff prior notice and an opportunity to be heard. Therefore, defendants' act of terminating plaintiff's employment was not protected by qualified immunity.

II. Deprivation of Plaintiff's Liberty Interest.

Defendants allege that they are entitled to qualified immunity because a reasonable person in the defendants' position could not have known that releasing statistical data regarding numerous physicians without identifying individuals could have violated a clearly-established right of the plaintiff. Plaintiff has alleged that defendants disseminated information to the press linking the four VA doctors discharged as a result of a VA audit with drug-related license irregularities. Defendants also informed other government agencies that plaintiff was fired for falsifying his application. The Seventh Circuit has held that even limited dissemination of stigmatizing information throughout the federal government impairs an individual's liberty interest. *Larry v. Lawler,* 605 F.2d 954, 958-59 (7th Cir. 1978). In sum, defendants have failed to provide this Court with any reason to alter its previous finding that plaintiff states a valid cause of action for deprivation of a liberty interest without due process of law.

Accordingly, defendants' Motion for Summary Judgment (Document No. 29) is hereby DENIED.

IT IS SO ORDERED.

DATED: May 13, 1988

/s/ James L. Foreman
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 87-4065

DONALD W. HANNON, M.D.,
Plaintiff,

vs.

THOMAS K. TURNAGE, Administrator of the Veterans' Administration, et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed: October 23, 1987)

FOREMAN, Chief Judge:

Before the Court is defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted and lack of jurisdiction over the subject matter.[1]

For purposes of defendants' Motion, all well-pleaded allegations of the Complaint must be taken as true. *Wolfolk v. Rivera,* 729 F.2d 1114, 1116 (7th Cir. 1984). The test to be applied on a motion to dismiss is whether "it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Plaintiff brought this action in three separate counts alleging that defendant violated his constitutional rights under the fifth amendment and 38 U.S.C. 4101 *et seq.* Count I states that the defendants' conduct was an intentional deprivation of

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[1] *See* Federal Rules of Civil Procedure, Rule 12(b)(6), 12(b)(1).

plaintiff's property and liberty interests without due process of law in violation of the fifth amendment. Count II states that the defendants' actions violated the plaintiff's right to notice and a fair hearing under 38 U.S.C. 4110. Count III states that defendants discharged plaintiff in violation of 38 U.S.C. 4106.

Plaintiff has invoked constitutional provisions to establish a right of action for a constitutional tort under the *Bivens* line of cases. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Cases subsequent to *Bivens* have noted two situations in which federal officers may not be sued for constitutional violations: when there are "special factors" counselling hesitation in the absence of congressional action, or when Congress has explicitly declared an alternative remedy to be an equally effective substitute for recovery directly under the Constitution. *Carlson v. Green,* 446 U.S. 14, 18-19 (1980). The complaint alleges that at no time prior or subsequent to his termination did defendants provide plaintiff with a hearing or opportunity to respond to any charges, confront any evidence, or appeal the termination.[2] Defendants concede that the plaintiff "had no right to administrative review of the Chief Medical Director's decision to cancel his appointment."[3] If regulations afford a plaintiff "no pre- or post-termination hearing or other procedural protection, a *Bivens* remedy must be implied. . . ." *Sonntag v. Dooley,* 650 F.2d 904, 907 (7th Cir. 1981). *See also Egger v. Phillips,* 710 F.2d 292 (7th Cir. 1983) (where constitutional rights of federal employees in the workplace not protected by statute, *Bivens* action properly brought).

Although the plaintiff may have been able to seek judicial review of the Veterans' Administration's action under the Ad-

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[2] Complaint par. 30-31, Count I.

[3] Defendants' Memorandum, p. 11.

ministrative Procedure Act, his relief would have been limited to relief other than money damages. 5 U.S.C. 702. Moreover, an alternative remedy is a factor militating against allowing a *Bivens* action only when "defendants show that Congress had provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." (citations omitted) *Carlson v. Green,* 446 U.S. 14, 18-19 (1980). *Egger v. Phillips,* 710 F.2d 292, 297 (7th Cir. 1983); *Harris v. Moyer,* 620 F. Supp. 1262, 1264 (N.D. Ill. 1985).

The complaint alleges that plaintiff had a property interest in his job based upon satisfaction of all statutory requirements for employment as a physician by the Veterans' Administration.[4] In *Perry v. Sindermann,* 408 U.S. 593, 601 (1972), the Supreme Court held that " 'property' interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *See also Hermes v. Hein,* 511 F. Supp. 123, 125 (N.D. Ill. 1980).

In the present case, the complaint alleges that the plaintiff had a statutory expectancy of continued employment under 38 U.S.C. 4101 *et seq.* Plaintiff also argues that the V.A.'s rules regarding appointments and mutual understandings between the plaintiff and his supervisors support the plaintiff's assertion that he had a constitutionally protected property interest that was violated by the defendants' actions. The complaint is thus sufficient to support plaintiff's claim that there was a "mutually explicit understanding" of continued employment amounting to a property entitlement. *Perry v. Sindermann,* 408 U.S. 593, 601 (1972).

The defendants allege that the plaintiff was illegally appointed because he had falsified his application by misrepresent-

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[4] Complaint pars. 23, 17, Count I.

ing the status of his medical licenses, out of fear of not being hired. Thus, the defendants argue, the plaintiff never acquired a valid property interest in his job. The Supreme Court, however, has rejected the argument that a plaintiff who obtains an illegal appointment by dishonestly filling out his employment application has no property right. *Cleveland Bd. of Educ. v. Loudermill,* ____ U.S. ____, 105 S.Ct. 1487 (1985). Furthermore, no V.A. rules allegedly allowing the V.A. to dismiss the plaintiff for falsifying his employment application can justify an unconstitutional deprivation of property. The due process clause requires that constitutionally adequate procedures be used when depriving one of the substantive rights of life, liberty, or property. ____ U.S. ____, 105 S.Ct. 1487, 1493 (1985).

The complaint alleges that the defendants terminated plaintiff's employment as a physician without a hearing or an opportunity to respond to any charges, thereby violating plaintiff's liberty interest.[3] In order to establish a liberty interest protected by procedural due process, an employee must demonstrate that his governmental employer brought charges against him that "might seriously damage his standing and associations in the community" or that impose a "stigma or other disability" foreclosing his "freedom to take advantage of other employment opportunities." *Board of Regents v. Roth,* 408 U.S. 573 (1972). An employer may constitutionally impair an individual's liberty interest by putting his good name, reputation, honor, or integrity at stake. *Id.*

The complaint states that the defendants caused the media to publicize the termination, resulting from an audit of V.A. physicians' licenses. The licensing audit revealed that a number of V.A. physicians had licensing irregularities and that the plaintiff had lied on his employment application about revocations and suspensions of his medical licenses. Moreover, the

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[3] Complaint par. 37, Count I.

defendants allegedly caused the media to report that sixty percent of V.A. doctors with licensing problems were disciplined by state boards for drug abuse and laxity in issuing prescriptons and that twenty-four V.A. doctors had their licenses suspended or revoked for drug-related misconduct.[6] Where a plaintiff is accused of lying on a government employment application, his liberty interests are implicated. *Walker v. United States,* 744 F.2d 67 (10th Cir. 1984). Nevertheless, more than simple defamation is required to establish a due process claim; the plaintiff must show that a right or status was altered or extinguished by the employer's action. *Paul v. Davis,* 424 U.S. 711 (1976). Loss of government employment or foreclosure from future employment satisfies this requirement. *Doe v. United States Dept. of Justice,* 753 F.2d 1092 (D.C. Cir. 1985).

In the instant case, the plaintiff's good name, reputation, and honor were allegedly undermined by defendants' actions. The complaint states that the defendants deprived him of his appointment as a V.A. physician and damaged his good name, professional reputation, and ability to practice his chosen profession.[7]

Therefore, the Court finds the allegations sufficient to support a valid cause of action and hereby DENIES the defendants' Motion to Dismiss Count I for failure to state a claim upon which relief can be granted.

In Count II, plaintiff alleges that the defendants' actions violated his right to notice and a fair hearing under 38 U.S.C. 4110.[8] Section 4110 disciplinary procedures apply to charges of

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[6] Complaint par. 33-34, Count I.

[7] Complaint par. 38, Count I.

[8] Complaint par. 59, Count II.

"ineptitude, inefficiency, or misconduct." Defendants dispute plaintiff's right to a predisciplinary notice and hearing under section 4110 on the grounds that his employment was cancelled because it was illegal and void *ab initio* due to plaintiff's dishonesty in filling out his employment application.[9] The defendants, however, cannot avoid their constitutional obligation to give the plaintiff the process due him by "rephrasing the basis for termination as a reason why [he] should not have been hired in the first place." *Cleveland Bd. of Educ. v. Loudermill,* ____ U.S. ____, 105 S.Ct. 1487, 1492 n.5 (1985).

Therefore, the Court finds the allegations sufficient to state a valid cause of action and hereby DENIES defendants' Motion to Dismiss Count II for failure to state a claim upon which relief can be granted.

Finally, the plaintiff alleges that defendants discharged him in violation of 38 U.S.C. 4106. The complaint states that section 4106 essentially provides that after serving a probationary period of two years, a physician may only be separated if "said board shall find him not fully qualified and satisfactory."[10] Defendants contend that the section 4106 procedures did not apply to plaintiff's termination because plaintiff did not hold a legal appointment. As the Supreme Court noted in *Loudermill,* a government employer cannot deprive a plaintiff of his constitutional right to due process simply because he lied on his employment application. ____ U.S. ____, 105 S.Ct. 1487 (1985). Accordingly, the Court DENIES defendants' Motion to Dismiss Count III for failure to state a claim upon which relief can be granted.

The defendant also argues that the United States must be dismissed for lack of subject matter jurisdiction. The United

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[9] Defendants' Memorandum, p. 16.

[10] Complaint par. 77, Count III.

States is " 'immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *U.S. v. Testan,* 424 U.S. 392, 400 (1976) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)). Plaintiff's complaint fails to demonstrate that the United States "unequivocally expressed" a waiver by statute of sovereign immunity in suits of this kind. *See United States v. Mitchell,* 445 U.S. 535, 539 (1980). Plaintiff's Memorandum opposing defendants' Motion to Dismiss concedes that this Court does not appear to have jurisdiction over the United States. Plaintiff promises to seek leave of court to amend the action to include a Tucker Act Claim, 28 U.S.C. 1346. Nevertheless, since plaintiff has not yet demonstrated that a Tucker Act waiver of sovereign immunity applies, this Court finds that it lacks subject matter jurisdiction over the United States.[11]

Furthermore, where a plaintiff names a federal agency as a defendant in an action, the general rule is that the agency may be sued only if Congress consented to the action, as the United States is the real party in interest. *See* Wright, Miller & Cooper, Federal Practice and Procedure, vol. 14, § 3655 p. 214 (1985); *see also Helash v. Ballard,* 638 F.2d 74 (9th Cir. 1980). Current law does not recognize the V.A. as a suable entity. *See Evans v. U.S. v. U.S. V. A. Hospital,* 391 F.2d 261 (2d Cir.), *cert. denied,* 393 U.S. 1040 (1968); *Fermin v. V.A.,* 312 F.2d 554 (9th Cir.), *cert. denied,* 375 U.S. 864 (1962). Plaintiff has, however, avoided the burden of showing a statutory waiver of sovereign

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[11] Should plaintiff, upon amending his complaint, show that the Tucker Act applies, this Court would only have jurisdiction to grant equitable and monetary damages of $10,000 or less. 28 U.S.C. 1346. *See Giordano v. Roudebush,* 617 F.2d 511 (8th Cir. 1980).)

immunity as to defendants Thomas K. Turnage and Dr. John Gronvall, the responsible officers of the agency.[12]

Accordingly, for the reasons stated herein, defendants' Motion to Dismiss Counts I, II, and III under Rule 12(b)(6) is DENIED. Defendants' Motion to Dismiss claims against the United States and the Veterans Administration is GRANTED. Plaintiff is hereby given leave to file an amended complaint which cures the defects listed in this Order. Said amended complaint may be filed within 15 days from the date this Order is entered and shall comply with Local Rule. 9.

IT IS SO ORDERED.

DATED: October 23, 1987

/s/ James L. Foreman
CHIEF JUDGE

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[12] Defendants Motion to Dismiss noted that where money damages are sought from a public official in his individual capacity, service by mail is inadequate. *Micklus v. Carlson,* 632 F.2d 227 (3d Cir. 1980); *Griffith v. Nixon,* 518 F.2d 1195 (2d Cir.); *cert. denied,* 423 U.S. 995 (1975). While Mr. Turnage and Dr. Gronvall were originally served by mail in the manner set forth by Rule 4(d)(5), they have since received personal service under the terms of Rule 4(d)(1) within the 120 day deadline set forth in Rule 4(j).)

APPENDIX F

§ 4105. Qualifications of appointees

(a) Any person to be eligible for appointment to the following positions in the Department of Medicine and Surgery must have the applicable qualifications:

(1) Physician—

hold the degree of doctor of medicine or of doctor of osteopathy from a college or university approved by the Administrator, have completed an internship satisfactory to the Administrator, and be licensed to practice medicine, surgery, or osteopathy in a State;

(2) Dentist—

hold the degree of doctor of dental surgery or dental medicine from a college or university approved by the Administrator, and be licensed to practice dentistry in a State;

(3) Nurse—

have successfully completed a full course of nursing in a recognized school of nursing, approved by the Administrator, and be registered as a graduate nurse in a State;

(4) Director of a hospital, domiciliary, center or outpatient clinic—

have such business and administrative experience and qualifications as the Administrator shall prescribe;

(5) Podiatrist—

hold the degree of doctor of podiatric medicine, or its equivalent, from a school of podiatric medicine approved by the Administrator, and be licensed to practice podiatry in a State;

(6) Optometrist—

hold the degree of doctor of optometry, or its equivalent, from a school of optometry approved by the Ad-

ministrator and be licensed to practice optometry in a State;

(7) Pharmacist—

hold the degree of bachelor of science in pharmacy, or its equivalent, from a school of pharmacy, approved by the Administrator, and be registered as a pharmacist in a State;

(8) Physical therapists, occupational therapists, dietitians, and other personnel shall have such scientific or technical qualifications as the Administrator shall prescribe.

(9) Physician assistants and expanded-function dental auxiliaries shall have such medical or dental and technical qualifications and experience as the Administrator shall prescribe;

(10) Psychologist—

hold a doctoral degree in psychology from a college or university approved by the Administrator, have completed study for such degree in a specialty area of psychology and an internship which are satisfactory to the Administrator, and be licensed or certified as a psychologist in a State, except that the Administrator may waive the requirement of licensure or certification for an individual psychologist for a period not to exceed two years on the condition that such psychologist provide patient care only under the direct supervision of a psychologist who is so licensed or certified.

(b) Except as provided in section 4114 of this title [38 USCS § 4114], no person may be appointed in the Department of Medicine and Surgery as a physician, dentist, podiatrist, optometrist, or nurse, physician assistant, or expanded-function dental auxiliary unless such person is a citizen of the United States.

(c) Notwithstanding any other provision of law, no person may be appointed under section 4104(1) of this title [38 USCS §

4104(1)] after the effective date of this subsection [effective Jan. 1, 1978] to serve in the Department of Medicine and Surgery in any direct patient-care capacity unless the Chief Medical Director determines, in accordance with regulations which the Administrator shall prescribe, that such person possesses such basic proficiency in spoken and written English as will permit such degree of communication with patients and other health-care personnel as will enable such person to carry out such person's health-care responsibilities satisfactorily.

§ 4106. Period of appointments, promotions

(a) Appointments of physicians, dentists, podiatrists, optometrists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements.

(b) Such appointments as described in subsection (a) of this section shall be for a probationary period of two years and the record of each person serving under such appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Administrator, and if said board shall find such person not fully qualified and satisfactory such person shall be separated from the service.

(c) Promotions of physicians, dentists, podiatrists, optometrist, and nurses shall be made only after examination given in accordance with regulations prescribed by the Administrator. Advancement within grade may be made in increments of the minimum rate of basic pay of the grade in accordance with regulations prescribed by the Administrator.

(d) In determining eligibility for reinstatement in Federal civil service of persons appointed to positions in the Department of Medicine and Surgery, who at the time of appointment shall have a civil-service status, and whose employment in the

Department of Medicine and Surgery is terminated, the period of service performed in the Department of Medicine and Surgery shall be included in computing the period of service under applicable civil-service rules and regulations.

(e) In accordance with regulations prescribed by the Administrator, the grade and annual rate of basic pay of a physician, dentist, podiatrist, optometrist, or nurse changed from a level of assignment where the grade level is based on both the nature of the assignment and personal qualifications, may be adjusted to the grade and annual rate of basic pay otherwise appropriate.

(f) The provisions of this section shall apply to physician assistants and expanded-duty dental auxiliaries.

(g) (1) Upon the recommendation of the Chief Medical Director, the Administrator (A) may use the authority in subsection (a) of this section to establish the qualifications for and (subject to paragraph (2) of this subsection) to appoint individuals to positions listed in section 4104(3) of this title [38 USCS § 4104(3)], and (B) may use the authority provided in subsection (c) of this section for the promotion and advancement of Veterans' Administration employees serving in such positions.

(2) In using such authority to appoint individuals to such positions the Administrator shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5 [5 USCS §§ 3301 et seq].

§ 4110. Disciplinary boards

(a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards, each such board to consist of not less than three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine, upon

notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title [38 USCS § 4104]. The majority of employees on a disciplinary board shall be employed in the same category of position as the employee who is the subject of the charges.

(b) The Administrator shall appoint the chairman and secretary of the board, each of whom shall have authority to administer oaths.

(c) The Chief Medical Director may designate or appoint one or more investigators, to assist each disciplinary board in the collection and presentation of evidence. Any person answering to charges before a disciplinary board may be represented by counsel chosen by such person.

(d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at the time, or disapprove such recommendation. The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

(e) The Administrator within such limitations as the Administrator may prescribe, may delegate to the Chief Medical Director the authority vested in the Administrator by subsections (b) and (d) of this section to (1) appoint the chairman and secretary of a disciplinary board, such official to have the power prescribed by this section, and (2) receive and act upon the recommendations of such a board. Any person against whom disciplinary action is taken under authority delegated pursuant

to this subsection shall have the right to appeal such action to the Administrator, but in the absence of such an appeal the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator.

APPENDIX G

CHAPTER 4. PROBATIONARY PERIOD

4.01 SCOPE

a. This chapter contains instructions and procedures necessary to effectively implement policies prescribed in VA Manual MP-5, part II, chapter 4.

b. It applies to all probational appointments of phycians, dentists and nurses.

4.02 REFERENCES

a. 38 U.S.C. 4104(1) and 4106(b)

b. MP-5, part II, chapter 4.

c. MP-5, part II, chapters 2 and 9 and related DM&S Supplements.

4.05 PURPOSE OF THE PROBATIONARY PERIOD

a. The probationary period is an extension of the appointment process. It provides the final test, that of actual performance on the job. During the probationary period, the employee's conduct, general character traits, and performance in the actual work situation may be closely observed, and he may be separated from the service without undue formality if circumstances so warrant. Thus, the probationary period protects management against the retention of any person, who, in spite of having met legal and regulatory requirements for appointment, is found in actual practice to be unsuited, professionally or otherwise, for permanent appointment in the Department of Medicine and Surgery.

b. The probationary period also affords an opportunity for fostering the interest of the employee. Intelligent and considerate treatment during the probationary period will often

have a lasting effect on his career. It will often serve for useful and efficient service employees who would otherwise be separated, or retained in assignments in which they have little prospect of success.

c. The probationary period cannot serve as a full and fair trial period without the cooperation of supervisors at all levels. New employees, particularly those with no prior Federal service, should not be expected to immediately render the services which would normally be required of experienced and trained employees. During the initial period of employment, a sincere effort must be made by supervisors and personnel officials to orient employees into the new work situation and to provide essential training and indoctrination.

4.04 AUTHORITY AND RESPONSIBILITY

A. **Legal Basis.** 38 U.S.C. 4106(b) requires a 3-year probationary period during which the services of physicians, dentists and nurses shall be reviewed and the separation of those employees who are not found fully qualified and satisfactory.

b. **Individual Responsibility**

(1) **Supervisors.** Supervisors are to continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the employment record of unsatisfactory employees or of those whose services are merely borderline are promptly referred for action.

(2) **Chief of Staff,** Upon the recommendation of the service chief, Chiefs of Staff are responsible for determining the need for a Professional Standards Board review of the services of employees at any time during the probationary period.

(3) **Professional Standards Boards.** Professional Standards Boards have the overall responsibility for reviewing the records of each employee serving a probationary period when requested by the Chief of Staff. The board will conduct such reviews as

may be necessary under the circumstances and in accordance with the instructions contained in this chapter.

(4) **Personnel Officers.** They serve as technical advisers to Professional Standards Boards. In this capacity, they have responsibility for rendering assistance and advice to members of the board in the conduct of their reviews, and for ensuring that the reviews and actions following review conform with applicable laws, VA policies and instructions.

c. **Approval Authority for Board Action Recommendations**

(1) **Separations.** See MP-5, part II, chapter 9 and DM&S Supplement thereto.

(2) **Admonishments, Reprimands, or Retention in the Service**

(a) Chief Medical Director for Central Office employees.

CHAPTER 8. DISCIPLINARY ACTION, GRIEVANCES AND HEARINGS

SECTION A. DISCIPLINARY ACTIONS

1. SCOPE

a. Section A of this chapter contains the basic policies to be observed, and requirements to be met in taking disciplinary actions involving permanent full-time physicians, dentists, nurses, and nurse anesthetists who have satisfactorily completed the 3-year probationary period after appointment in the Department of Medicine and Surgery under the authority of 38 U.S.C. 4104(1). Suspension pending investigation of the facts or final decision in a disciplinary case, although not a disciplinary action, is treated in this section because of its close connection with disciplinary actions.

b. Section 14 of the Veterans' Preference Act of 1944, as amended, does not apply to physicians, dentists, nurses, and nurse anesthetists included within the scope of this chapter.

2. REFERENCES

a. 38 U.S.C. 4110. (See par. 6, Introduction to this part.)

b. MP-5, part I, chapter 7, section A.

[c. MP-5, part I, chapter 1.]

3. POLICY

Supervisors at all levels will be responsible for maintaining discipline by providing the leadership and example that ordinarily will result in obtaining from employees willing and full compliance with instructions, established policies, procedures, rules and regulations, and with commonly accepted standards of personal conduct. Whenever an employee's performance of duty or his personal conduct is unsatisfactory because of inaptitude, inefficiency, neglect, or unwillingness to comply with instructions, established policies, procedures, rules and regulations, and with commonly accepted standards of personal conduct, appropriate disciplinary action will be taken in accordance with the provisions of this section. To be fully effective, disciplinary action should be taken as promptly as possible after the offense has been committed.

4. AUTHORIZED DISCIPLINARY ACTIONS

A. **Types** Disciplinary actions in order of severity are: admonishment, reprimand, suspension, demotion or discharge.

b. **Definitions**

(1) Admonishment is a written reproval of an employee for some infraction involving a relatively minor degree of seriousness or is a warning against repetition of such infraction.

(2) Reprimand is a formal letter written to the employee because of some infraction of a marked degree of seriousness. The letter contains a description of the offense as to time, place, and circumstances, and a statement of official censure.

(3) Suspension is an enforced temporary nonpay status and absence from duty. There are two distinct types of suspension: (a) Suspension as a disciplinary action, and (b) Suspension pending investigation of the facts, determination of charges, or final decision on proposed disciplinary action.

(4) Demotion for the purposes of this section is a reduction in grade and salary imposed for disciplinary reasons. (A reduction in responsibility or rank not accompanied by a reduction in grade and salary shall not be considered a demotion for disciplinary reasons.)

(5) Discharge is a separation from the service of an employee for cause.

[C. **Approval Authority for Disciplinary Actions.** The Chief Medical Director may approve all types of disciplinary actions except suspension, demotion, or discharge in positions for which the Administrator retains prior approval authority for all personnel actions. Field station heads may issue letters of reprimand with the prior concurrence of the Area Medical Director, and they may admonish upon their own authority. Before admonishment or reprimand is given, the employee will be notified, and given an opportunity to present his views.]

5. INITIATING DISCIPLINARY ACTION

a. **Who May Initiate.** Initiation of disciplinary action for any penalty may be made at any supervisory level.

b. **Bases for Initiating.** Contemplated disciplinary action may be initiated for reasons of professional or personal misconduct, professional inaptitude or inefficiency. Disciplinary action will not be taken in cases of error of professional judgment when negligence is not involved nor in cases of differences of professional opinion.

c. **Initiation of Proposed Action**

(1) The Medical Officer, highest in authority at the station, will assure that a thorough preliminary inquiry is conducted to obtain all of the facts prior to the official initiation of a request for proposed action, including those facts relating to the employee's view in the matter. When initiating proposed disciplinary action more severe than admonishment or reprimand, the station [head] will forward the preliminary inquiry and any pertinent comments of station officials to the Chief Medical Director for review. If the review shows that the appropriate disciplinary action should be reprimand or less, the Chief Medical Director may take the action or he may refer the matter, through the Area Medical Director, to the station [head] for action.

(2) When station heads request the removal, demotion, or suspension of an employee through preferment of charges, the request will be evaluated for the Chief Medical Director by a Central Office Screening Committee. The organizational structure of this committee will be similar in nature to that outlined for Disciplinary Boards in paragraph 3 of section C. The Chief Medical Director will appoint all members of the Screening Committee. No person may serve on both a Disciplinary Board and a Screening Committee in handling the same case.

6. LETTER OF CHARGES

a. If review of the facts by the Chief Medical Director results in the preparation of a letter of charge proposing disciplinary action more severe than reprimand, it will be prepared in Central Office.

b. Letters of charges will notify the employee:

(1) Of the specific disciplinary action that is proposed;

(2) Of the specific details and circumstances constituting the basis for action;

(3) That he may make a written explanation in his own behalf within the specified reasonable period of time ([within] 5 work-days from date of receipt of letter of charges);

(4) That he will be given a hearing by a Disciplinary Board as outlined in section C, this chapter, if he makes a written request for it within the specified reasonable time period;

(5) That he may appear personally at the hearing, be represented by counselor other person of his own choosing, produce witnesses, and present evidence in his own behalf;

(6) That he is being given 30 days advance notice of the proposed action, specifying either duty status or suspended status during the advance notice period; and

(7) That final decision will not be made in the case until all facts and evidence have been fully and fairly considered.

7. APPEALS

[a. Disciplinary actions more severe than an admonishment approved by the Chief Medical Director may be appealed in writing through channels to the Administrator.]

b. An employee who receives an admonishment or a reprimand [from an official other than the Chief Medical Director] may appeal the decision in writing through channels to the Chief Medical Director who acts for the Administrator in rendering the decision on the appeal.

[c.] In an appeal of a reprimand, the employee shall be afforded opportunity for a hearing, unless the reprimand results from recommendations of a Disciplinary Board.

8. SUSPENSION PENDING INVESTIGATION OR PENDING DECISION ON PROPOSED DISCIPLINARY ACTION

Suspension for these purposes may be authorized when the complaint(s) or offense(s) alleged or charged are of such

magnitude and gravity as to make it inadvisable or impracticable to continue the employee in a duty status. No employee will be suspended from duty except with specific approval of the Chief Medical Director. Where the approval is requested and/or obtained orally, both the request and the approval will be confirmed in writing.

CHAPTER 9. SEPARATIONS

9.01 SCOPE

a. This chapter contains procedures for the separation of physicians, dentists and nurses employed in the Department of Medicine and Surgery. It also includes termination procedures for all professional, clerical, technical and unskilled personnel, appointed under 38 U.S.C. 4103 and 4114. Termination procedures also cover persons utilized under authority of 38 U.S.C. 213.

b. The term "nurse" as used in this chapter includes nurse anesthetists unless otherwise specified.

c. This chapter does not include removal actions. They are covered in MP-5, part II, chapter 8 and related chapters, this supplement.

9.02 REFERENCES

a. Title 38, United States Code, chapter 73 and chapter 3, section 213.

b. MP-5, part II, chapter 9.

9.03 AUTHORITY AND RESPONSIBILITY

a. **The Administrator**

(1) Approves all involuntary separations and initiates agency requests for disability retirement of:

(a) Physicians who are field station heads.

(b) Employees appointed or designated under authority of 38 U.S.C. 4103.

b. **The Chief Medical Director**

(1) Approves involuntary separation of employees occupying centralized positions when such employees are separated for:

(a) Disability.

(b) [Failure to meet statutory requirements or holding a position in violation of law or regulations.]

(c) [Abandonment of position.]

(d) [Deleted by revision of chapter 9, dated February 25, 1966.)]

(2) Approves [involuntary] separation of all employees [when such employees are separated for:

(a)Failure to qualify or perform satisfactorily during probationary period.

(b) Failure to accept transfer.)

(3) Initiates agency requests for disability retirement of Central Office employees.

c. [(Deleted by revision of chapter 9, dated February 25, 1966.)]

d. **Field Station Heads**

(1) Approve involuntary separation of employees occupying [noncentralized] positions when such employees are separated for:

(a) Disability.

(b) [Failure to meet statutory requirements or holding a position in violation of law or regulation.]

[(c) Abandonment of position.]

(2) Approve termination and initiate agency requests for disability retirement of station employees.

e. **Personnel Officers** are responsible for determining that all separations and terminations comply with applicable laws, rules, regulations and VA policies. They have responsibilities to both management officials and the employee concerning whom separation or termination action is being taken. These responsibilities consist of rendering assistance and advise to the persons concerned regarding contemplated separation or termination actions.

9.04 DEFINITIONS

a. **Separation**. A personnel action, other than removal or termination, which results in loss of a permanent or probationary employee from the agency's rolls.

b. **Termination**. A loss from the agency's rolls of persons appointed under 35 U.S.C. 4103 and 4114 and persons utilized under 38 U.S.C. 213.

d. **Designations of Officials To Approve Penalty Actions**. The field station head will designate officials who may admonish and reprimand employees under his jurisdiction in accordance with the following:

(1) **Admonishment**. The official who may sign a letter of admonishment will be the official who has good knowledge of the facts involved and is in the normal supervisory channels.

(2) **Reprimand**. The official who may sign a letter of reprimand will in no case be lower than a chief of service.

4.08 ACTION UPON COMPLETION OF THE PROBATIONARY PERIOD

a. Each employee who satisfactorily completes the probationary period will automatically attain permanent statue.

b. Some form of acknowledgment to those who acquire permanent status is desirable. For example, a congratulatory letter to the employee over the signature of field station head, or an item in the station's news bulletin.

c. No formal personnel action is required to confirm the completion of the probationary period.

4.09 CREDITABLE SERVICE

For service creditable toward completion of the 3-year probationary period, see MP-5, part II, chapter 4, paragraph 5. . . .

DM&S Supplement, MP-5, Part II chapter 2, change 26

f. Qualification Standards and Requirements

(1) The basic requirements for appointment of a physician, dentist, nurse, resident and intern in DM&S are contained in the VA Qualification Standards. Those standards are contained in appendixes 2C through 2F. They apply to all appointments under 38 U.S.C. ch. 73, irrespective of the nature or tenure of the appointment.

(2) The minimum qualifications outlined in VA Qualification Standards must be met in selecting for appointment in DM&S and in establishing grades and rates of pay for all physicians, dentists and nurses appointed under 38 U.S.C. ch. 73. []

h. License or Regulation

(1) All physicians [and dentists (except regular residents and interns, and physicians and dentists approved for appointment under provisons of sub-par. (5) below) appointed under 38 U.S.C. ch. 73 are required to possess a full unrestricted license to practice medicine, surgery, osteopathy, or dentistry, as appropriate, in a "State," and must furnish evidence of this with

their applications. Current registration will be maintained in accordance with the requirements of the State of the employee's licensure. Limited licenses or any other type of license less than a full unrestricted State licensure (however denominated, e.g., temporary, limited, institutional, those obtained on the basis of being faculty members, etc.) do not meet the licensure requirement for appointment under 38 U.S.C. ch. 73. The *one* exception, to the above, involves physicians and dentists who have met all the professional requirements for admission to the State licensure examination *and have passed such examination,* but who have been issued a limited State license on the basis of noncitizenship or not meeting the residence requirements of the State, and their practice is not limited to a particular facility, or to practice under supervision, their licenses meet the statutory requirements of 38 U.S.C. 4105.] . . . .

(4) [(a) Appointing officers will use VA Form 5-4682, Certification of Licensure, Registration, or Bar Membership, to verify the possesson of a current State license and/or registration when processing the appointment of physicians, dentists, and nurses. Thereafter, an expiration date followup will be coded as provided for by VA Manual MP-6, part V, supplement No. 1.5 (PAID). The station Director will designate the official(s) who will be responsible for the followup verfication of the employee's current license and/or registration. VA Form 5-4682 will be used and be filed on the right side of the employee's personnel folder. Only the initial form and the latest form are required to be on file.

(b) Employees who do not maintain their current license and/or registration must be removed from their positions and assigned to other positions for which they qualify or be separated under appropriate procedures.]

[(5)] The requirement that the licensure of a physician or dentist or the registration of a nurse must be in a State may be waived for the purpose of appointment under 38 U.S.C. 4114 as described below:

(a) The Chief Medical Director, or [ ] designee, may waive the licensure of a physician or dentist if [the employee] is to be used in a research or academic post or in a position where there is no direct responsibility for patient care.

(b) The field station [Director] may waive the licensure of a physician or dentist or the registration of nurse in any case where the individual is to serve in a country other than the United States and [the] licensure or registration is in that country. (See par. 2.08a(9).)

APPENDIX H

Department of Veterans Affairs
Veterans Health Services and
Research Administration
Washington, DC 20420

CIRCULAR 10-90-038

April 4, 1990

TO: Regional Directors; Directors, VA Medical Center Activities, Domiciliary, Outpatient Clinics, and Regional Offices with Outpatient Clinics

SUBJ: Credentialing and Privileging of Physicians and Dentists

1. **PURPOSE:** This VHS&RA (Veterans Health Services and Research Administration) Circular provides policy requirements and guidance to health care facilities on the credentialing and privileging of physicians and dentists. This circular does not apply to residents except for those who function outside the scope of their training program, i.e., as Admitting Officers of the Day. The provisions of this circular will be incorporated into MP-5, part II, chapter 2 and a new chapter to M-2, part I, chapter 33.

2. **POLICY:** All VHS&RA physicians and dentists will be properly credentialed and privileged. Traditionally, the requirements of the JCAHO (Joint Commission on Accreditation of Healthcare Orgainzations) standards and VHS&RA policies have been used to define credentialing, privileging, reappraisal and reprivileging process. The primary objective of this circular is to prescribe minimum requirements for this process for physicians and dentists. This circular will apply to all VHS&RA physicians and dentists involved in patient care who are appointed or utilized on a FT (full-time), PT part-time), intermittent, consultant, attending, WOC (without compensation), on-station fee-basis, on-station contract or on-station sharing agreement basis. Policy and procedures related to the reduction and revocation of clinical privileges apply to all individuals included within the scope of this circular as specified in Attachment D of this circular.

3. ACTION

a. Facility Directors will ensure that all physicians and dentists are properly credentialed and privileged in accordance with requirements outlined in the Secretary's letter of August 2, 1989, this circular, and JCAHO standards. Credentialing and privileging procedures for physicians and dentists covered by this circular will be the same. Actions taken under these procedures will be strictly adhered to and documented. The requirements of this circular will be incorporated into the Medical Staff Bylaws.

b. The facility Director will establish a mechanism to assure that all individuals with clinical privileges function within the scope of privileges granted. All individuals granted clinical privileges will be provided with a copy of the Medical Staff Bylaws and must agree to accept the professional obligations reflected therein. The individual requesting privileges, the appropriate service chief and the Chief of Staff will be provided with a copy of the clinical privileges granted by the facility Director.

c. A credentialing and privileging folder will be established for each physician and dentist requiring privileges. These folders will be the responsibility of the Chief of Staff and will contain a copy of all documents relevant to the credentialing and privileging process.

d. Procedures to be followed in credentialing physicians and dentists for initial appointment or reappointment after a break in service are contained in Attachment A to this circular; procedures for clinical privileging, in Attachment B; procedures for reappraisal and reprivileging, in Attachment C; procedures for reduction or revocation of privileges, in Attachment D, and a checklist for credentialing, reappraisal and reprivileging, in Attachment E.

e. Questions may be referred to Susan J. Brennan, FTS 373-3118.

4. **REFERENCES:** 38 U.S.C. 4104(1), 4108, 4110, 4117, 213, 3308; MP-5, Part II, Chapters 2, 4, 8 and 9 and their VHS&RA Supplements; Circulars 10-88-18, 10-89-86; Pub. L. 99-166 and Pub. L. 99-660.

5. **RESCISSONS:** VHS&RA Circular 10-88-16. This VHS&RA Circular will expire April 4, 1991.

6. **FOLLOW-UP RESPONSIBILITY:** Director, Professional Affairs Staff (11D2).

/s/ John A. Gronvall, M.D.
Chief Medical Director

THIS CIRCULAR EXPIRES APRIL 4, 1991

ATTACHMENT A

INITIAL APPOINTMENT OR REAPPOINTMENT AFTER A BREAK IN SERVICE

1. **Credentialing**

a. General Provisions. Individuals must be fully credentialed and privileged prior to initial appointment or reappointment after a break in service of more than 15 workdays.

(1) Credentialing is the systematic process of reviewing the qualifications and the health status of applicants for appointment, to ensure that they possess the required education, training, experience and skill to fulfill the requirements of the position. This attachment contains the administrative requirements and procedures related to the initial credentialing of physicians and dentists.

(2) The credentialing process includes verification of the individual's professional education, training, licensure, health status and previous experience. Employment commitments shall not be made until applicants have been properly screened through the appropriate State licensing boards and, for physicians, the FSMB (Federation of State Medical Boards). Individuals reappointed after a break in service of more than 15 workdays must be screened again through the appropriate State licensing board(s) and FSMB (physician applicants only). All information obtained through the credentialing process will be carefully considered before an employment decision is made. (See paragraph 2 for the exception permitted to meet emergent or urgent patient care needs.)

b. Licensure

(1) Requirement for Unrestricted Licensure

(a) Except as provided in VHS&RA Supplement, MP-5, Part II, Chapter 1, paragraph 2.04h, every VHS&RA physician and dentist must have a current, full and unrestricted license to prac-

tice medicine, surgery, or dentistry in any State, Territory, or Commonwealth of the United States (i.e., Puerto Rico), or in the District of Columbia. If required by the State of licensure, current registration must also be maintained.

(b) A physician's or dentist's license is restricted if the State licensing board has suspended the licensee's ability to independently prescribe controlled substances or other drugs, selectively limited one's authority to prescribe a particular type or schedule of drugs; or accepted one's offer or voluntary/agreement to limit authority to prescribe.

(2) Appointment of Candidates with Flawed Licensure

(a) Physicians and dentists who have a current unrestricted license in one or more States, but who have ever had, a license restricted, suspended or revoked, will not be hired without prior Central Office approval.

(b) Requests for such approval will be sent with full documentation through the appropriate Regional Director and to the ACMD for Clinical Affairs (10BA____/11D2), or the ACMD for Dentistry (10BA____/16/11D2) for approval by the Associate Deputy Chief Medical Director (10B). Documentation will include VA form 10-2850, "Application for Physicians, Dentists, Podiatrists and Optometrists;" reference(s); copy of prior clinical privileges, if available; recommended clinical privileges; VA Form 10-2843, "Board Action," with recommendation by the facility PSB (Professional Standards Board) for physician applicants; results of the FSMB screen for physician applicants; documented verification of licensure in all States where the candidate claims to have ever held a license; State licensing board document with any findings of facts detailing the basis for action of the applicant's for any State(s) in which action was taken; and the Official Personnel Folder for any applicant with prior VA or other Federal service.

c. Verification with State Licensing Board(s). The Chief of Staff will document on the employment application, VA Form

10-2850, that the status of all licensure/registration has been verified with the appropriate State licensing board for all States in which the applicant lists having ever held a license. Verification may be through telephonic contact with the State licensing board which must be documented. At the request of the Chief of Staff, the facility Director may delegate responsibility for contacting State licensing boards.

d. FSMB Screening

(1) Physician applicants will be screened with the FSMB prior to appointment. The FSMB is a disciplinary information service and will report only those disciplinary actions resulting from formal actions taken by reporting medical licensing and disciplinary boards or similar official sources. The FSMB is a secondary information source; any reported information must be validated with the primary source, i.e., the State licensing board. Screening applicants with FSMB does not abrogate the Chief of Staff's responsibility for verifying with State licensing board(s) all medical licenses held by physician applicants prior to appointment. This requirement does not apply to dentists or residents functioning in a training program.

(2) Physician residents who function outside of the scope of their training program, i.e., who are appointed as Admitting Officer of the Day, must meet the credentialing and privileging requirements of this circular, including possession of a full and unrestricted license and screening through the FSMB.

(3) In requesting FSMB screening, each facility will submit to the Regional Director's field office the full name, date of birth, medical school attended, year of graduation from medical school, and social security number. Applicant information will be submitted to the Regional Director's field office by the close of business on the Monday prior to the first and third Tuesday of each month.

(2)

No. 89-1962

FILED

AUG 20 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD W. HANNON, M.D., PETITIONER

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner's complaint in this action alleged that he was denied procedural due process when he was terminated from his government position for failing to possess a legally valid appointment. The question presented is whether, for purposes of an assertion of qualified immunity, it was clearly established that petitioner possessed a property interest in his position that would trigger due process protections.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The opinion of the court of appeals (Pet. App. A3-A23) is reported at 892 F.2d 653. The opinions of the district court of October 23, 1987 (Pet. App. A30-A37), and May 18, 1988 (Pet. App. A24-A29), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1990. A petition for rehearing was denied on February 13, 1990. Pet. App. A2. This Court's order extending the time for the filing of a petition for a writ of certiorari (Pet. App. 1) was issued April 27, 1990. The petition for a writ of certiorari was filed on June 13, 1990. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. 1254(1).[1]

STATEMENT

1. In 1979, petitioner was appointed staff surgeon at a VA hospital in Grand Junction, Colorado. Over the next several years, petitioner was transferred to other VA facilities, and in 1983 he was promoted to chief of surgical service at the VA hospital in Marion, Illinois. Pet. App. A4.

At the time of petitioner's original appointment, VA physicians were required by statute to "be licensed to practice medicine, surgery, or osteopathy in a State." 38 U.S.C. 4105(a)(1). The VA's regulations provided that "[l]imited licenses or any other type of license less than a full unrestricted State licensure (however denominated, e.g., temporary, limited, institutional, those obtained on the basis of being faculty members, etc.) do not meet the licensure requirement for appointment under 38 U.S.C. ch. 73." DM & S Supplement to VA Manual MP-5, pt. II, ¶ 2.04(h)(1), *reprinted in* Pet. App. A54-A55.

Petitioner did not have an unrestricted license in 1979 because the licenses he previously had obtained from California, Washington, and Minnesota had

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[1] One of the individuals named as respondent, Edward J. Derwinski, is presently Secretary of Veterans Affairs. He was not a party to the proceedings below. Another respondent, Thomas K. Turnage, was his predecessor as Administrator of the Veterans Administration at the time of the events in suit. Since the decision of the court below involved only a claim against Turnage in his personal capacity (see p. 4, *infra*), the attempted addition of Mr. Derwinski as a party in this Court, presumably under Rule 35.3 of the Rules of this Court, is ineffective.

Respondent John Gronvall died on August 2, 1990.

been revoked, suspended, or inactivated.[2] On his application for the VA job, petitioner did not respond to a question asking whether his license to practice had ever been revoked or suspended, despite the fact that the form required a certification that all answers were true and complete to the best of the applicant's knowledge and belief. Pet. App. A4.

As a result of a nationwide audit of the licensure status of doctors it employed, the VA discovered in 1986 that petitioner had not had an unrestricted license when he was initially appointed in 1979. Pursuant to advice given by the agency's general counsel, the VA concluded that its own regulations required petitioner's immediate discharge because he had not met the qualifications for his position at the time of his appointment. See DM & S Supplement to VA Manual MP-5, pt. II, ¶ 9.09(b).[3] On June 23, 1986,

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[2] In 1986, petitioner regained an unrestricted license from Minnesota. Pet. App. A4.

[3] Paragraph 9.09(b) provides in relevant part that:

> Any time it is found that a physician * * * fails to meet the statutory requirements for appointment, immediate action will be taken by the field station head to separate employees occupying decentralized positions. The complete circumstances regarding employees occupying centralized positions will immediately be reported to the Chief Medical Director for action. Employees occupying decentralized positions will be informed that they may request review of the separation action immediately upon receipt of the notice of proposed action. If there is some doubt as to the legality of an appointment or if review is requested, the complete record of the case along with any statement or evidence the employee desires to submit will be forwarded by the most expeditious means to the [Chief] Medical Director for decision. The field station head may defer separation of the employee while decision of the

petitioner's supervisor informed him that his position was terminated effective that day. Petitioner did not receive prior written notice of the personnel action, written reasons for the action, or a hearing with respect to the facts that occasioned it. Pet. App. A4-A5.

2. In March 1987, petitioner filed this suit seeking monetary and injunctive relief against the United States, the VA, and respondents John Gronvall (Chief Medical Director of the VA) and Thomas K. Turnage (Administrator of the VA), alleging that he had been deprived of property and liberty interests without due process in violation of the Fifth Amendment. (The action for monetary relief against Gronvall and Turnage was based on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and was thus brought against them in their personal capacity.) The district court denied a motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction (Pet. App. A30-A37), but dismissed the action as to the United States and the VA on grounds of sovereign immunity. Pet. App. A35-A37. Gronvall and Turnage then moved for summary judgment on the *Bivens* claim, on grounds of qualified immunity. The district court denied the motion, holding that it was clearly established at the time of petitioner's discharge that he had a property interest in his position. Pet. App. A27-A29.

3. The court of appeals reversed. Pet. App. A3-A23. The court noted (Pet. App. A6-A7) that government officials are entitled to immunity from suit

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reviewing official is pending. However, if the field station head is convinced that the appointment of the employee in question violates the statutory requirements for appointment he will approve immediate separation.

for the performance of discretionary functions unless their conduct violates clearly established constitutional rights. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Applying that standard, the court held (Pet. App. A7-A15) that, on the basis of undisputed facts, petitioner "has not proved the existence of any property right that the defendants might have violated, let alone proved the existence of a clearly established right." Pet. App. A7. In particular, the court relied on the fact that, at the time of his appointment, petitioner did not have the qualifications required by law for the position to which he was appointed. Pet. App. A8-A9. Moreover, pertinent statutes and regulations put him on notice that he could not reasonably rely on any expectations he may have developed that his appointment would continue. Pet. App. A9. With respect to petitioner's claim that "an entitlement to his position arose through mutually explicit understandings between him and his superiors" (Pet. App. A12), the court held that "[t]he VA had no authority to hire [petitioner], and thus he could not legitimately rely on any assurances of continued employment." *Ibid.* The fact that the VA lacked authority to hire him provided a "crucial" (Pet. App. A13) distinction between this case and *Cleveland Board of Educ.* v. *Loudermill*, 470 U.S. 532 (1985), where one of the plaintiffs, who apparently held a valid appointment, was fired for falsifying a job application. Pet. App. A12-A13.[4]

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[4] The court also (Pet. App. A15-A17) rejected petitioner's contention that he had been deprived of a liberty interest without due process of law. Petitioner does not renew this contention here.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The decision of the court of appeals is consistent with this Court's decision in *Cleveland Board of Educ.* v. *Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, one of the plaintiffs was summarily dismissed when his employer, a local governmental body, discovered that he had falsely stated on his job application that he had never been convicted of a felony. 470 U.S. at 535. The Court held that the plaintiff was not deprived of a "legitimate claim of entitlement"—one that would trigger due process protections—because he had obtained his job after lying on the job application. 470 U.S. at 539 n.5. The Court explained that the State could not "escape its constitutional obligations by rephrasing the basis for termination as a reason why [the plaintiff] should not have been hired in the first place." *Ibid.*

In this case, the VA did not terminate petitioner because he lied on his job application, nor has the VA attempted to "escape" any constitutional obligations by "rephrasing" the basis for his termination. Whereas the Cleveland school board would apparently have had authority to hire Loudermill had it known the truth concerning his criminal record, the legal requirements in force at the time of petitioner's appointment to the VA's Department of Medicine and Surgery precluded hiring any person who did not have an unrestricted medical license. Therefore, unlike *Loudermill*, where the State claimed that the responsible officials *should* not have hired the em-

ployee in light of his false job application, in this case the VA *could* not have hired petitioner because he did not posesss the necessary qualifications.[5]

This distinction is a significant one. Not only does it bear on the question of whether petitioner had a protected interest, see point 2, *infra*; it also bears on the question whether a hearing would have served any purpose when, as here, petitioner does not challenge the existence of the facts that disqualified him under the applicable regulations at the time he was hired.

2. a. None of the sources of entitlement on which petitioner relies provided him with a legally protectible property interest in his continued employment. As the court of appeals held, the mere fact that he was hired could not create such a property interest, because the statutes and regulations concerning qualifications for his position at the time he was hired—and throughout the period he was employed—put him on notice that his appointment was invalid. See Pet. App. A8.

b. Neither of the statutes on which petitioner relies alters this conclusion. Under 38 U.S.C. 4106(b), VA physicians are appointed "for a probationary period of two years." During that time, their performance is reviewed periodically, and the statute requires that they "shall be separated from the service" if they are found to be "not fully qualified and satisfactory." *Ibid.* As the court of appeals observed (Pet. App. A10), this provision only applies to per-

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[5] Petitioner suggests (Pet. 13) that the VA terminated his employment because he falsified his application, not because he lacked the required qualifications for appointment. The court of appeals squarely rejected this factual contention. Pet. App. A13 n.6.

sons who have received a legal appointment and governs terminations based on job performance.[6]

Nor does 38 U.S.C. 4110, the other statute upon which petitioner relies, create a legitimate expectation of continued employment for persons not appointed in compliance with statutory requirements. In pertinent part, the statute provides that the VA's Chief Medical Director shall appoint boards to determine on fair notice and hearing "charges of inaptitude, inefficiency, or misconduct" of persons employed by the VA's Department of Medicine and Surgery. 38 U.S.C. 4110(a). As the court of appeals recognized, the predicate for application of this provision was absent in this case; the VA did not fire petitioner "because of inaptitude, inefficiency, or misconduct, but because his VA appointment was void." Pet. App. A11.[7]

c. The court of appeals properly rejected petitioner's claim (Pet. 15-18) that the facts demonstrated a mutually explicit understanding of continued employment. Petitioner relies primarily on his assertion (Pet. 3 n.1) that he informed the VA at the

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[6] As the VA's regulations explain, employment review under 38 U.S.C. 4106(b) during the probationary period protects the agency from retaining an employee who is unsuited for permanent employment "in spite of having met legal and regulatory requirements for appointment." DM & S Supplement to VA Manual, MP-5 pt. II, ¶ 4.03, *reprinted in* Resp. C.A. Br. A6.

[7] In *Neal* v. *Walters*, 750 F.2d 347 (5th Cir. 1984), the court of appeals held that 38 U.S.C. 4110 applied to "disciplinary action" initiated when VA medical center officials are "dissatisfied with [the] performance" of a physician. 750 F.2d at 350. Because the personnel action here was neither disciplinary nor related to petitioner's job performance, *Neal* is inapposite.

time of his initial appointment that he did not have an unrestricted license from any state. According to petitioner, when the VA appointed him despite that knowledge, it thereby endowed him with a property interest in his job.

It is undisputed that petitioner did not disclose on his application that his licenses to practice medicine at the time of his employment were restricted. In light of this fact, the clear command of applicable statute and regulations precluded any agency employee from giving petitioner a legally valid assurance of continued employment.[8]

Contrary to petitioner's assertion (Pet. 16-17), there is no division among the circuits concerning whether an individual appointed to a position for which he is not legally qualified has a property interest in his continuing employment that triggers procedural due process analysis. The only other court to address the issue reached the same conclusion as the Seventh Circuit, holding that an individual appointed to a government position to which he cannot be validly appointed does not possess a "property right" in that office for purposes of procedural due process analysis. See *Kauffman* v. *Puerto Rico Telephone Co.*, 841 F.2d 1169, 1174-1175 (1st Cir. 1988); see also *Rosario-Torres* v. *Hernandez-Colon*,

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[8] Petitioner claims (Pet. 17-18) that circulars issued earlier this year by the VA (see Pet. App. A57-A62) show that the agency did possess statutory authority to hire physicians with restricted licenses. Yet the recent modifications of agency policy show, at best, that the agency could have adopted somewhat different job qualifications in 1979, when petitioner was hired. They do not alter the fact that, at the time petitioner was hired, as well as at the time he was terminated, the applicable statute, as interpreted by VA regulations, disqualified him from the position to which he was appointed.

889 F.2d 314, 319-320 (1st Cir. 1989) (en banc). The cases cited by petitioner all involved individuals who were plainly qualified to hold the positions to which they were appointed, but who nonetheless were fired despite express, though informal, assurances that their employment would continue.[9]

d. Finally, even if there were an arguable basis on the facts of this case for a finding that petitioner had a legally protectible property interest, Gronvall and Turnage retain their qualified immunity from suit because the existence of such an interest—and hence the asserted unconstitutionality of their actions —was not "clearly established." It is undisputed that petitioner's employment was summarily terminated on the basis of the explicit advice of the VA General Counsel's office. Pet. App. A5. And the First Circuit's decisions cited above suggest that that

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[9] In *Orloff* v. *Cleland*, 708 F.2d 372 (9th Cir. 1983), the issue was whether repeated and indefinite extensions of a VA doctor's temporary appointment created a protectible property interest; there was no question that the doctor was legally qualified to hold his position. *Id.* at 377. In *Soni* v. *Board of Trustees*, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976), the court recognized that a university professor who had received explicit assurance of continued employment had a property interest in his position. Although the professor was ineligible for tenure, there was no doubt that he was eligible to hold his teaching position. Finally, in *Vail* v. *Board of Education*, 706 F.2d 1435 (7th Cir. 1983), aff'd, 466 U.S. 377 (1984), the Seventh Circuit held that a local governmental unit had violated a contractual obligation—albeit an implied one—when it refused to extend an athletic coach's appointment as it had promised. The plaintiff in *Vail*, as in the other cases cited by petitioner, plainly possessed all necessary qualifications for his position. (An intra-circuit conflict within the Seventh Circuit would not in any event warrant further review.)

advice was fully in accord with constitutional standards. An official who relies on advice of counsel that is fully consistent with the decisions of those appellate courts to reach the issue cannot be held to have violated a "'clearly established" right.

3. In an argument not advanced before in this litigation, petitioner contends (Pet. 19-21) that respondents are estopped from relying upon the statutory and regulatory requirements concerning appointment of VA physicians. While petitioner's allegations, even if true, would not warrant estoppel,[10] petitioner's failure to present his estoppel argument below makes review by this Court unwarranted. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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AUGUST 1990

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[10] See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2469-2470 (1990) (assuming *arguendo* that estoppel may ever apply against government, it cannot apply absent affirmative misconduct).

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